(No. 94.)

1889.

PARLIAMENT OF TASMANIA.

THE TASMANIAN MAIN LINE RAILWAY COMPANY (LIMITED)

versus

THE QUEEN.

Presented to both Houses of Parliament by His Excellency's Command.

IN THE SUPREME COURT
OF TASMANIA.

CIVIL SITTINGS.

TUESDAY, 7TH MAY, 1889.

(Before His Honor SIR LAMBERT DOBSON, *Knight, Chief Justice.)*

TASMANIAN MAIN LINE RAILWAY COMPANY

versus

THE QUEEN.

THIS was an action brought by the Tasmanian Main Line Railway Company, Limited, against the Government of Tasmania to recover certain arrears of interest alleged to be due on moneys expended in the construction of the Main Line Railway.

[Mr. W. Cracroft Fooks, Q.C., the Hon. Byron Miller, and Mr. A. M. Ritchie (instructed by Messrs. Dobson, Mitchell, & Allport) appeared for the Plaintiff Company. The Attorney-General (Hon. A. Inglis Clark), Dr. Madden, and Mr. John M'Intyre (instructed by the Crown Solicitor) appeared for the Government.]

MR. FOOKS intimated to the Court that his rank as Queen's Counsel had been recognised by the Government, and he took precedence as senior member of the Bar next after the Hon. Attorney-General.

The following Jury was sworn :—William Woolley, George Salier, William Golding, Charles F. Cresswell, Charles Edward Walch, Robert Richmond Rex, and David Lewis.

MR. RITCHIE: May it please your Honor, and Gentlemen of the Jury. The supplication in this case is filed under the Crown Redress Act, and the proceedings as framed are properly in accordance with an ordinary declaration at law. The first count is a special count, and has reference especially to the contract—the contract as executed by the Company on the one hand, and by His Excellency Charles Du Cane on the other hand, dated 15th August, 1871, and entered into on behalf of the Colony of Tasmania. The contract is set out *verbatim* in the supplication, but it is not my intention to occupy your time by reading it. It is a lengthy document, and would take up time and tax your patience. No doubt its contents are pretty well known to some of you, and at all events you will have quite enough of the contract by the time you are called upon, under the direction of His Honor, to give your verdict. Shortly, the plaintiff Company, under that contract, covenanted to construct a line of Railway between Hobart and Launceston, and further covenanted, after completion and opening of the line, to maintain and work it for a period of thirty years. That is, broadly, the covenants on behalf of the Company. In consideration of that contract, and the due fulfilment thereof, the Governor guaranteed interest at the rate of five per cent. per annum on the sum expended by the contracting Company in the construction of the line, limited to the sum in the whole of £650,000—that is, he contracted to pay the Company a sum of £32,500 a-year. That, briefly, is the contract. The supplication avers that the Company has completed the railway, and performed all acts necessary on their part to entitle them to claim the sum of £32,500, and further avers that breaches of the contract have been made by defendants, and complains of the non-payment of a sum of £14,527 1*s.* 6*d.* of this guaranteed interest. There is a second count, claiming for interest upon balances of guaranteed interest not paid to the Company, to which I need not more particularly refer: and that, gentlemen, is the supplication. There is annexed to the supplication particulars of demand, setting out the amounts item by item, and the dates on which they became payable, and the Company claims interest from these dates to that of the supplication. The

defendants have pleaded three pleas. The first plea expressly admits the contract, but denies all the averments other than the averment as to the making of the contract set out in the supplication; the second plea pleads that defendants were never indebted to the plaintiff Company in the sum of £14,527 1*s.* 6*d.*, or of any part of it. The third plea is a special plea, which I feel it my duty to read to you. It is this:—

"And for a third plea to the said supplication the said Attorney-General, for and on behalf of our said Lady the Queen as aforesaid, as to the sum of £14,527 1*s.* 6*d.* parcel of the money claimed in the said supplication, says that it is enacted in the fifth Section of the Act of the Parliament of Tasmania, 46 Vict. No. 43, intituled "An Act to provide for the settlement of certain disputes with the Tasmanian Main Line Railway Company (Limited)," (meaning the suppliants), that is to say:— In the accounts of the said Company to be rendered pursuant to the said contract (meaning the accounts to be rendered by the suppliants to the Governor of Tasmania pursuant to the deed or contract set out in the said supplication) the revenue and expenditure for and in respect of the maintenance and working of the said railway (meaning the Tasmanian Main Line Railway) shall be adjusted on the principle of yearly balances. The quarterly statements provided for by the said contract shall be rendered and audited as heretofore, but the balance of profit and loss shall be struck yearly, and if such yearly balance shows a profit on the working of the said railway for such year, such profit shall be deducted from the guaranteed interest. And the said Attorney-General says that the accounts of the said suppliants for and in respect of the maintenance and working of the said railway for the years 1883 and 1884 have been rendered pursuant to the said contract, and have been adjusted on the principle of yearly balances pursuant to the provisions of the said Act, and the yearly balances for each of the said years shows a profit upon the working of the said railway for each year respectively, which yearly balances of profit respectively the Government of Tasmania, for and on behalf of our said Lady the Queen, were entitled to deduct from the amount of the guaranteed interest payable to the said suppliants under the said contract; and the amount of such yearly balances of profit respectively, including the said sum of £14,527 1*s.* 6*d.*, has been deducted from the said guaranteed interest."

Those, gentlemen, are the pleas set up by the defendants raising the issues on which you will be called upon to give your verdict. To all these pleas issue has been joined, and upon the issues so raised it will be your duty to give your verdict, subject to the direction of His Honor.

Mr. Fooks, *Q.C.:* May it please Your Honor, and Gentlemen of the Jury.—You have heard from my learned friend that involved in this case there is a contract, and I will at once call your attention, and the attention of the Court, to the terms of that contract, for on the interpretation of those terms the whole case rests. This is not a question for the Jury upon matters of fact; it is more a question for the Court as to the construction to be placed on the contract as a matter of law. That is the main line in which the arguments will spread—the chief question that has to be considered. The root of the whole thing is the contract, and it is necessary to particularly understand that, as the sums in dispute relate to the profits of the undertaking. What are the profits of the undertaking? That is the question to be decided. You have heard, in the third plea read by my learned friend, that the profits, or a portion of them, were to be deducted from the £32,500 per annum. I call your attention to that fact, as it shows the question to be as to the profit of the undertaking. I care not whether it be called profit of the railway, profit of maintenance and working, or profit of the undertaking. Whatever it be called, it is the profit on the undertaking which you have to consider, and which you will find explained in the contract, clearly defined and interpreted; and this is the point which will run through the whole of the arguments. Then let me call your attention to the terms of this contract. Bear with me if I try your patience a little, but it must take time to call attention to this contract, as when that is explained the case will be much simplified.

[Mr. Fooks here called attention to the desirability of the Jury being supplied with copies of the contract, and they were so provided.] He continued: This contract is dated 15th August, 1871, but it is provided that it should not take effect until the time it was signed and executed by the Company, which was done on the 15th March, 1872. In going through the contract, I will call attention to the various documents in their order, and show what the Company is, and the circumstances of its formation in England. The best plan would be to go to the contract at once, which recited the two Acts, the Act of 1869 known as "The Main Line Railway Act," and "The Main Line of Railway Amendment Act." The first clause of the contract was 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 hereof, which construction, maintenance, and working are included in the expression "the said undertaking" herein used.

He would call the attention of the Jury to the words of the clause "construct, maintain, and work a Main Line of Railway," which meant, not a railway to be maintained for thirty years, but a railway to be maintained and worked in perpetuity. He believed in point of fact a railway was constructed to Evandale, with running powers over another line of railway to Launceston. He believed this railway was constructed and opened for traffic on the 1st November, 1876, and at that point the consideration as to the construction of the line ceased. The second clause provided that—

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.

There was nothing much in that, for, as a matter of fact, the contract had not been substantially altered or varied. He contended there had been no alteration in the original contract, although presently he should call attention to the Act of Parliament known as the "Disputes Settlement Act." That did not vary the contract, but he should refer to it in time and in proper order. If he took up the various matters in the order he had arranged he should be able to much more lucidly explain them, and he should do this. He need not trouble the Jury with the next clauses, but come to Clause 5. This was the keystone of the whole thing:

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.

He desired to call special attention to the word "interest." That did not mean profits. It might as an abstract and academical question be included in the term profits, but there was no guarantee in the deed of profits; there was a guarantee of interest, and interest on what? Interest at the rate of five per cent. per annum on the money actually expended in the construction of the line up to £650,000. Let them pause there. It was clearly implied there that the capital was not limited to £650,000. They might spend as much as they chose, but interest was guaranteed "up to" that amount. He would make one observation. Much correspondence had taken place upon this very point of "construction"—correspondence which he had waded through with very little profit. He did not quite see to what it tended. The other side said in their pleas they were to pay on construction, but he did not see the exact case they were going to open, therefore he could not foreshadow what was not likely to take place. He should be glad of a whisper from his learned friends on the other side, which might save him going into matters which they might not mean to contend. The interest was to be paid on the cost of construction during four years of the period of construction and for thirty years afterwards, and whatever meaning was expressed in the contract a special meaning has been permitted and allowed to be given to it on behalf of the Government by the Government officers, and Government have been satisfied with it. He held that was of no importance on the question of construction—the construction account was closed, although the capital account might not be. It was important they should note the distinction. The 6th Clause of the contract was 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 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.

That must refer to maintenance and working, and if the line is not maintained and worked there is to be no payment of the guaranteed interest. He was very anxious to impress this upon the Jury, because what the Government contended was this—that they, the Company, had put something down to maintenance and working which was not maintenance and working, but was construction. Now, he held that in the very word "maintenance" there must be some construction. They could not maintain the line and run it efficiently with a due regard to the exigencies of traffic without renewing certain portions. They must remember this is a railway more or less perishable and liable to wear out, therefore you have to maintain it and keep it in working order, which means continual renewals of its parts. Then, as traffic opens sufficient station accommodation has to be provided with due facilities for passenger and goods traffic, and this goes on on every portion of the line for all time. Station accommodation must be extended, and as traffic increases better accommodation must be provided in order to give due facilities to the public as stipulated by the contract. If this was insufficient then there would be no payment of interest, so that as far as the Company was concerned it must be provided. He was now done with this clause, and thought he had shown the difference between original construction and what had to be done as a continuance of the work—continuous construction—which had to be carried on so long as the guarantee continued. He would now refer to Clause 8, having reference to accounts and payments:—

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.

He would call the special attention of the Jury to the words "so far as the same can be made up in the Colony." The contract, of course, referred to a company being formed in England and with its management there. It would be impossible to have what was known as "closed accounts." There was a great difference between them and running receipts and expenditure, and there was sure to be many accounts which could not be completely closed without reference to England, so it was necessary to provide for accounts to a point "so far as they could be made up in the Colony." When these accounts are provided the Governor shall be bound to pay to the Company such a sum as shall with the profit, if any, make up interest at the rate of five per cent. on such sum as the railway and works may cost. Now, they would see it was the profit which had to be proved by his learned friends opposite. In one part of the contract this was referred to as the profit of the undertaking, in another as the profit of the railway. He did not care how they read it, whether undertaking or railway: the terms were the same, and the words railway or line were really only a shorthand mode, as it were, of expressing "the undertaking." The "undertaking" generally meant the construction or working of the railway. He did not care how the words might be used, because for all purposes of the argument they were synonymous. He now came to Clause 9, as to the adjustment of the accounts. It read

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.

There they had the same words again,—"so soon as the same can be adjusted in the Colony.' These accounts were to be brought on in an open account from quarter to quarter, and they might be kept open for a short or a long period. It would of course be the Company's interest to close the accounts as soon as possible to ascertain their liabilities and receipts, their earnings and revenue, and to ascertain and bring up their account against the Government for interest. It was their duty and interest to bring up and adjust these accounts as soon as possible. The Government or the officers of the Government had nothing to do with the adjustment of these accounts. They had to be adjusted and brought up by the Company, subject to examination, and if there were any open accounts at the end of a quarter—any accounts of items that had not matured "as to actual receipt or payment"—those must be carried on to be adjusted in a future quarter. He was aware it was contended there was a modification of the contract in reference to the accounts in what was known as the "Disputes Settlement Act"; there was a saving clause, but unless they found it in the contract he contended that it made no difference—every word of the contract must remain. He should contend that practically there was no difference between the position of the Company and the Government under the Disputes Settlement Act and what it was under the original contract. These accounts had to be vouched for. Clause 10 of the contract provided—

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.

The Act recognised the right of the Government to call for evidence as to the correctness of the accounts, and for vouchers, that is, satisfactory evidence of alleged receipts and expenditure. If the Government passed these accounts and vouchers there was an end of it; but it was open to them to say, You have presented false accounts, or accounts contrary to the contract. He could understand the Government saying, You have rendered false accounts, but if they relied on such a statement it should have been included in the pleadings. It was not pleaded, and he contended that so long as they had rendered honest accounts which would bear proof—

Dr. Madden: We do not say you have rendered false accounts in the sense of dishonest accounts.

The Attorney-General: It is more properly in the sense of incorrect accounts.

Mr. Fooks: If they said incorrect accounts he could understand it, but that was the question to be decided. They said that certain of the items charged were not properly charged to maintenance and working: that was, that the account was incorrect, and it was in that sense he used the word. In effect, the Government said these were works put down to the account of maintenance and working which were not properly due to maintenance and working. Capital was one thing, construction, maintenance, and working were quite another thing. He could understand accounts opened for maintenance and working and a profit being shown, but, as for transferring amounts as between revenue and capital, they could not make a profit that way. They could not by any possible means turn expenditure into a profit: it must be expenditure, and they could not turn that into a receipt. The next Section, 11, said—

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.

Now the Company had returned accounts according to this clause of the contract. He did not understand that the Government had raised any plea to the effect that the Company had not given every facility for checking and vouching every account submitted by them. It was simply the academical question as to the transferrence from revenue to capital account. They say you must put it to capital account—that we had charged something to maintenance and working which should be charged to capital account. He held that the profit of the undertaking must be the difference between the receipts and the cost of maintenance and working. The capital expended was the sum spent in the construction of the line. He held that construction properly ended when the railway was opened; from that time the construction account was closed. It was contemplated in the contract that it should be closed, because when the line was opened for traffic another state of things had arisen. They had then to furnish accounts in a certain way, and the Governor had to pay the subsidy. He now came to Clause 12, referring to the profit of the undertaking and the limitation of that interest—

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.

That was the only clause which entitled the Government to reduce the amount they had undertaken to pay—that was, interest on the whole sum of £650,000. It was incumbent on the Government to show there had been profits of the undertaking during the year for which the claim was made. He did not understand the learned Attorney-General, or whoever advised him, to raise the actual issue that there had been profits of the undertaking. He supposed they intended to raise that question in an argumentative way. It was a little embarrassing to him, but he intended, if it was done, to be prepared to meet it. He now came to Clause 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.

This was a new feature, but it was somewhat important when they came to deal with the question of a profit and loss account. One argument was as to whether those profits did not mean the ordinary profits of working plus the interest on the capital expended in the construction of the line. They contended that it should be so. They were guaranteed interest on the capital expended. Profits meant the excess of income over expenditure plus the interest on the amount of capital expended in construction. He was aware the accounts had not been returned in that way, but that had nothing to do with what they had to decide. There was much in the correspondence which he had read which was mistaken, and in which there was ambiguity as to the construction of the contract. The only ground on which he could account for it was this, that the parties to that correspondence did not see any profits made, or, at least, not to an amount which would reduce the interest on the £650,000 to any material extent; therefore, so long as the accounts were rendered in a form which substantially complied with the contract they were satisfied. They should now require a correct account, including the item of interest, and he should not be estopped by these accounts having been rendered from showing the Jury what were the real profits of the undertaking. On the equity side of the Court accounts would have been asked to show what were the profits of the undertaking, and His Honor would have directed accounts to be taken by skilled accountants, and all these matters would have been brought out. That could not be done under the present form of action. He knew well the provisions of the Common Law Procedure Act of 1884 as worked in England, and this gave the courts a certain amount of equitable jurisdiction on the common law side. He believed they had a similar Act here, but he did not know the amount of power which it gave for amending proceedings; but whatever was done to unmask the obscurity in which this case was involved—whatever was necessary to place a true issue before the Jury—he hoped would be done, so that the decision arrived at might determine the matters in dispute, not for three years or any other limited period, but so that it should be a guide for the future. They should be happy to amend anything so that they could determine the question as to how they were to go on so as not to have disputes in the future. It was possible they might get a verdict; but if they did, what then? Government might say we shall not pay. If they did, he did not know how he could make them, and therein he was peculiarly situated. A man might refuse to pay his just debts, and he could be proceeded against, but it was a question whether they could enforce a remedy in this case. This was the fourth supplication that had been before the Court. In one case it was pleaded that the Government was not liable to pay this interest, and they would not pay until advised to do so by the late Attorney-General of England, Sir John Holkar, Mr. Cyril Dodd, and Mr. Benjamin. They then found out they were wrong, and an Act of Parliament was passed which settled the matter. They disputed again, and this ended in the passing of the Disputes Settlement Act, as it was called. All these difficulties arose on the assumption of the Government that something was wrong and their declared determination, "we won't pay," and this contrary to a consensus of eminent

legal opinion obtained on behalf of the Company; and it was on the advice of Sir John Holkar and others that they got the Act of 1878. [Mr. Fooks referred to the 42 Vict. No. 5, and continued.] He intended to refer to the question as to what constituted profit as contended by the Government. He held this could not hold good unless they could show at the end of any quarter a profit on construction and maintenance. They could not do this by taking out certain items of expenditure and calling them profit. That was not a profit—that was not an adjusting of accounts. The Government had ordered their audit staff in the Colony to virtually interpret the contract in their own way, and he could only say that this was a grievous error, for they had no such power. They assumed a power and a jurisdiction which they did not possess under any of the Acts. They could have the accounts vouched, could examine all the books and accounts of the company, and could demand all information to satisfy them that the accounts submitted were correct; but this was all the Auditor had to do. It was not for the Auditor to take items out of the accounts submitted on his own responsibility and call that an adjustment of accounts: that is not an adjustment of accounts. These accounts had never been adjusted in the sense in which the Courts at home applied the word adjusted. To put it in that way was to raise the issue that these were not just accounts; but that issue had never been so raised. It was for the Company to adjust those accounts; it was for the Auditor to audit and test them. These accounts of receipts and expenditure had been given, and it had never been challenged that they were not right, or that particular amounts should not be charged to maintenance and working. All the Government had to do was this: if they had said such and such an item is not on account of maintenance and working, it is for something else, therefore we will take it out; that would be a different thing; but they had never raised that objection. They simply said you must charge certain items to capital account. The account, as far as capital was concerned, might all be for construction and maintenance. The accounts of working and maintaining the railway had been correctly kept. Of course in an elaborate system of accounts a profit and loss account should have been raised, and he believed such an account would define the liabilities that were necessary for the purposes of the Contract. Had that been the contention he could understand it, but it was not so pleaded, and it was not necessary now. If that was what was wanted it might have had to be done, but he was afraid His Honor's powers under these proceedings would not go so far—at least he did not see in what way it could be done. If it was to be done His Honor would see that he must direct the sending of the accounts to a skilled accountant to raise a profit and loss account, and if that were done the accountant would take the capital and interest on capital, and every other item that would properly come into a profit and loss account on the undertaking. He would now take up the contract again in reference to Clause 13. It would be seen that in certain circumstances the amounts divisible were to belong exclusively to the company to be divisible amongst the shareholders. He was not going to contend that because he thought it had reference simply to the Company's right to share the profits of the undertaking, but it was important to note this as something engrafted upon the Act of Parliament. It made the Company participators, in a certain contingent event, in the profits: what profits? Why the profits of the undertaking. Now let them go to Clause 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.

Now, then, they would see it clearly expressed that the interest was to be received in the first place from the profits of the undertaking. It appeared to him that they were to take that interest out of the profits, in this sense, that before they could declare the amount of divisible profits they must charge the interest, that is, they would share the profits plus the interest on the capital expended. He would call the attention of His Honor and the Jury to the original Reports of the Royal Commission and the first Acts of Parliament presently. He intended to refer to the report, and the financial results in that report, but he desired now to show that the interest on capital up to the amount of £650,000 had to be taken into the account, and in returning the accounts interest had to be allowed before the profits could be stated. The financial result on which the Act was founded was that there must be interest taken out on the capital expended in construction before there could be divisible profits as between the Company and its shareholders. Whatever the term profits might mean was for them to decide, but in arriving at profits they must take into account everything in the shape of liability. There was no paraphrase for the term profits. Sometimes it might be called net profits; sometimes earnings, revenue, receipts, and profits. All the way through his argument he should address himself to this—that profits mean profits available for dividends, and that the term did not mean interest. As a mere academical question interest did not mean profits, but interest must be paid out of profits before there could be profits to be divided. The first thing they had to do in arriving at a true account was to take out the interest. He would now refer to the 15th clause:—

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 open for traffic) belong exclusively to the Company.

Nothing turned upon that except that the Company was to be entitled to something during the period of construction, and, under the 8th clause, after the line is opened for traffic accounts were to be raised, and the Governor had to pay such sum as would, with the profits, make up the interest. He now came to a very important clause when read in connection with the 6th clause, as it intensified it, and followed the very wording of the Act of Parliament on which the contract was founded. Clause 16 said :—

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.

These words, "the opening of the said railway," were very clear. That was the thing to be maintained and worked—the railway; and that was the thing on which interest was to be paid; and to enable them to pay that interest they were "to keep and maintain the railway and the rolling-stock, and generally the whole undertaking, in good and efficient repair and working condition." Now for a moment let them go back to the first clause, and they would see that the word "undertaking" included and meant "construction, maintenance and working," these words being included in the expression "the said undertaking." Now, they had got in the 6th clause the meaning of this: they were to maintain and work the line 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 in the 16th clause they "were bound at all times to keep and maintain the same and the rolling-stock, and, generally, the whole undertaking, in good and efficient repair and working condition." The railway, then, was the thing to be constructed, maintained, and worked, and when the words undertaking, railway, or line were used, it was only a short mode of expressing the same thing. Then came the power of giving notice to purchase in Clause 17, but he should take no notice of that at the present time. As to purchase, the section provided that if the Government wanted to buy they must do so as provided. They had wanted to purchase, and had opened negotiations, but in their own way, not that provided by contract. For all he knew, negotiations were going on now. It might be, on the side of the Jury, an idea that the Company had delayed these proceedings from a desire to bring about a purchase, but this was not so. Negotiations had been made with a view to purchase, and the Government were still making them. That was one reason why after the supplication was filed there had been, as it were, a suspension of proceedings. He did not refer to these negotiations having been made and causing delay in proceedings for the purpose of finding fault, although one side might say it was your fault, and the other side the reverse. No matter how it was, it could have nothing to do with the question of the contract. Under that what had to be done for purchase was that notice should be given, and the correspondence in regard to purchase had now nothing to do with the question at issue. He considered a great mistake had been made by the Colonial Auditor in supposing he could have anything to do with the conditions of the contract as to purchase, or as to what might take place under a notice for purchase. Under the 17th clause notice had to be given; but in the meantime each of the parties were, under the 19th clause, bound by the conditions of the Acts of Parliament on which the contract was founded, and under the 18th clause their obligations were correlative. He read the clauses :—

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 versâ*.

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.

Of course, there were also independent stipulations which one side or the other might refuse to perform. It would be absurd if it were not so, and they might be quarrelling about all sorts of things. He did not dwell on that, although his learned friend called attention to it, and stress was laid on it in the pleas; but they had only to do with the conditions of this contract, and these conditions dealt with this—how the railway was to be constructed, maintained, and worked. The contract put certain obligations on the Company, and so long as the Company conformed to and fulfilled these obligations it fulfilled the conditions of the contract as to construction. That, he contended, they had done. It was settled and done with; construction was ended and complete; the capital had been expended. Then the line was to be a running and going concern. It had to be worked—that was the position of it. It was to be completed, and had to be maintained in working order. The Act of Parliament said clearly what had to be done. The gauge of the railway, weight of rails, construction of bridges, the number of trains to be run, speed, and all other things, were specified in the schedule to the contract from which he quoted. That was to be the railway as completed and opened with a view to profits. There could be for profits nothing but the traffic receipts; profits must arise from earnings and revenue. This would be important to remember when they came to consider the terms of the Disputes Settlement Act. What they had to do was to construct the railway and to keep it in an efficient state as a complete and going concern—an efficiently working railway which was to afford all sufficient station accommodation and due facilities for the passenger and goods traffic of every portion of the line. It was to be a complete and perfect railway, stock, lock, and barrel, and in complete working order. Now, if this had not been done he said it was the fault of the Government, and not of the Company. The Company, he contended, had been cramped

and curtailed in the conduct of its undertaking, and prevented from making profits by the illegal and improper interference of the Colonial Auditor, who, backed up by the Government, said in effect, "You shan't carry on your business properly; you shan't put on new engines; you shan't provide new rolling-stock; you shan't improve your station accommodation." What was the result of all this? Why, great loss to the Company, who were thereby prevented from making the profits which they ought to have done. He contended that, under such circumstances, it was a mechanical impossibility to conduct the railway as it should have been done at the least possible expense with a view to profit. He could show the gentlemen of the jury that, owing to this interference, the expense to the Company had been enormous in repairing and tinkering up old engines, and in providing sufficient rolling-stock to meet the increasing traffic. If the public considered that the facilities for travelling afforded were not enough, then he said it was the Government that had compelled them to do as they had done. They had to pay deference to the interpretation placed on the contract by the Government, who said "If you don't, we won't pay the subsidy." Whatever the result of this case, they might say the same thing now. The jury might give the Company a verdict, but the Government might still say we shan't pay, and he did not see how he could get the amount. He could not take out execution against the Government; however, it had to be got. It was the Parliament who had to vote the supplies. For all he knew, some of the jury might be members of it, and if that Parliament said we won't vote the amount he had no power to make them. He could only rely upon the honour and good faith of the country, which was pledged in this matter. It was for the jury to see that the honour and good faith of the Colony were upheld under the contract, and he conscientiously appealed to them to do so. He did not think there was anything further of much importance in the contract, except those provisions for the carrying of mails, and that giving the Company power to construct and use for its own profit a private line of telegraph upon the railway. Of course, the receipts formed a part of the traffic receipts of the line, and had been brought into the accounts as furnished. They should not be so put down, but he would abide by the accounts as furnished for the purposes of this argument. He thought he might on this occasion claim a good deal more than appeared in the accounts, and it was not because they had not claimed certain items that they could not now be brought into an account for profits, or under the contract. In that sense this item did become material, as all profits from this source were to belong to the Company. He wished to call attention to the Disputes Settlement Act, in which he saw that receipts and expenditure were for and on account of maintenance and working. There could, of course, be no receipts except from working; and working included maintenance. The term maintenance included all things necessary to maintain and work the whole undertaking as a going concern for the purposes of profit. That was by having an efficient train service, and carrying goods and passengers, &c. These were the sources of profit, and he contended they had been prevented from getting a great deal more than had been realised through being unable to extend their operations. The whole conditions of the contract had been performed by the Company, and a great deal more, and, as far as the Company was concerned, there was no wish to extend them. He would point out to His Honor and the jury that powers were expressly given to the Company to maintain, repair, and alter, and it was no obligation between the Company and the Government to do it. The Company were to make the undertaking as profitable as possible, and it was for their own safety. The Government said "Fulfil your obligation, and we are not to dictate to you; keep your own accounts." It was clearly provided that the Company should keep their own accounts, and they had done so. They had fulfilled their obligation in every way. He would draw attention to the Act to authorise the Governor in Council to contract for the construction of a Main Line of Railway through Tasmania upon certain terms. "Whereas," the Act stated, "it is expedient to authorise the Governor in Council to enter into negotiations and to contract for the construction of a Main Line of Railway between Hobart Town and Launceston, or to some point on the line of the Launceston and Western Railway, upon the terms hereinafter set forth." There were other amending Acts which showed that the line was to be a working undertaking. The Governor in Council was authorised to make a contract for the construction, working, and maintenance of the railway, and he showed what "working" really meant. The Government were empowered to invite tenders to induce persons to take the railway. It was not thought advisable for the Government to undertake the work themselves, so the Company was brought into existence on the representations made by Act of Parliament, and the report upon which the Act was founded. As for the financial results that were to be expected, they went to England and found people willing to undertake the work—foolish enough to do so—but not without interest on capital. As for getting profit on the undertaking, in the sense of paying it to the shareholders, it had not been able to do so up to the present time. He had no doubt that it would come in the future. Such a state of things might arrive when profit would be realised. Clause 7 of the first Act related to construction of works. What works? The previous clause stated that the "Company, for the purpose of constructing, repairing, and maintaining the said railway and works, may, after fourteen days' notice to the owner or occupier, enter upon any uncultivated land, and may fell, carry away, and use indigenous timber, except when the same is used for ornament or shelter to any dwelling-house; and may also dig, quarry, carry away, and use clay, stone, or other material, and may place and deposit upon any such land any materials, waste, or spoil: provided that full compensation for taking any of such materials, or for depositing any such materials, waste, or spoil, as in this section mentioned, shall be made to all parties interested for the damage thereby sustained." Then Clause 7 gave them power

to enter upon cultivated land. The clause was as follows :—"Subject to the provisions of this Act, it shall be lawful for such person or company, for the purpose of constructing the said railway and works, to execute any of the following works ; that is to say :—To enter upon any land without notice to survey and take the levels of the same ; to make or construct upon, across, under, or over any lands, streets, roads, rivers, creeks, or other waters such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, culverts, drains, arches, cuttings, fences, and other works as such person or company may think proper ; to divert or alter, as well temporarily as permanently, the course of any stream of water, roads, streets, or ways, or raise or sink the level of any such roads, streets, or ways in order the more conveniently to carry the same over or under or by the side of the railway, as such person or company may think proper ; to make drains or conduits into, through, or under any lands adjoining the said railway for the purpose of conveying water to or from the said railway ; to erect and construct such houses, warehouses, goods sheds, offices, and other buildings, yards, stations, wharves, engines, machinery, and apparatus, and other works and conveniences as such person or company may think proper ; to from time to time alter, repair, or discontinue the before-mentioned works, or any of them, and substitute others in their stead ; to do all other acts necessary for making, maintaining, altering, or repairing the said railway and works ; provided that, in the exercise of the above-mentioned powers, such person or company shall do as little damage as can be, and shall make full compensation, in manner hereinafter and in any Act incorporated herewith provided, to all parties interested for all damage by them sustained by reason of the exercise of such powers." This clause did not say "fixed" engines, but "all" engines that were wanted. These were the powers of the Company as clothed by the Legislature of the Colony, and to his great surprise he found that they were told, "You must not do this or the other, although you may think it necessary for the efficient working of the line, and to make it worthy of the Colony, and suitable to the exigencies of the public, so that it would be a credit to Tasmania." They were to be starved. Government said "No, you shall not do these things." He would not talk about motives. Sometimes he saw some very hard things said in the correspondence, but he would not repeat them. He would say that although the officers of the State acted to the best of their ability and knowledge, and with a view of ensuring the interests of the Colony, their policy had been a great mistake. They had crippled the resources of the Company, preventing the exercise of the powers to which he had alluded. He was told that objection had actually been made to the Company building gates upon the railway to prevent trespass, and the erection of a gatekeeper's lodge so as to protect the public from injury.

[Dr. Madden : We do not object ; we say you are to pay for them.]

Mr. Fooks [continuing] : The Government said they would not pay the subsidy, and he would not say that they had no power to say this. All the Company could do under these circumstances was to come to a Court of Law. He was in the hands of the jury, and was entitled to say that the Government, by the injudicious interference of the officers of state, who no doubt acted to the best of their lights according to their construction of the Contract, and according to their views and knowledge of the case, had assumed powers they did not possess. They had no business to dictate to the Company in the way they had. When the Government threatened the Company to deduct money it was no vain threat. The Company had on two occasions agreed to deductions for the sake of peace ; but the time for submission was over. He was willing to hear anything that the Government might say, but his duty was simply a forensic one, to deal with the Contract, and therefore he was glad the interruption had taken place, in that he now saw his way more clearly. The letters—there were three of them—of 1884 had been regarded as implied threats, and no gentleman of the jury would think otherwise than that they were so to be regarded. They said, "we will not pay you unless you do so and so. If you improve the line, and do this or that, never mind about necessities, we will not pay you that subsidy ; you must conform to our recommendations." He called them recommendations, but they had a threat behind them, and had all the force of an imperative demand. They said, "you shall not do so and so, or you must pay the penalty and lose your subsidy." He would have said in the first instance "well, let us bring this to an issue at once." But that had not been done, and they found themselves now before the Court to ask for justice. His view of the case was clear, and he did not think it would be disputed : it was for them to say whether the items as given in the abstract of accounts were confined to the expenditure on working and maintenance of the line. Evidence had been taken by Commission : if the jury had read that evidence—they were not assumed to have read it—they would see what things were due, in the opinion of witnesses, to maintenance and working. That evidence might be of service, but he did not think it would be, because the common sense of the jury would be able to tell what ought to be debited as working expenses of the railway. Still, the evidence was behind, and he was prepared with evidence of that description, instead of confining the case to arguments as to the construction of the contract. Counsel could exercise their ingenuity if they wished—and it was very amusing sometimes to the bystanders—in puzzling the witnesses and making them a laughing-stock. That was not part of his duty—it was no part of his duty so to conduct the case. He rather hoped that his learned friend would agree with him in the opinion that this was a question as to the construction of the contract and no more. That was his view, and therefore there was no necessity for the evidence. He did not court it, and he hoped before long he would have some information as to the limits of the case. If they were to call evidence it would last a very considerable time, but if confined to the lines indicated by him it would not do so. He could not anticipate his learned friend, and simply made this digression because it was sometimes of use. He had to prepare the jury for what they had to expect, but he

could tell the jury that as far as his views were concerned he did not intend to waste their time. Coming back to the Act, it dealt in Clause 15 with works for protection and accommodation of owners of lands. If any works were required of that nature for the accommodation or safety of the public, it would have been very churlish of the Company if they did not have them carried out. They were to "make and maintain such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof; also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle or the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands and not towards the railway; and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands if the owners thereof shall so require, and the said other works as soon as conveniently may be; also all necessary arches, tunnels, culverts, drains, or other passages either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the waters clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be, and such works shall be made from time to time as the railway works proceed; also proper water places for cattle, where by reason of the railway the cattle of any person occupying any lands lying near thereto shall be deprived of access to their former watering-places, and such watering-places shall be so made as to be at all times as sufficiently supplied with water as theretofore, and as if the railway had not been made, or as nearly so as may be; and the Company shall make all necessary watering-courses and drains for the purpose of conveying water to the said watering-places." It would have been very churlish on the part of the Company if they had not done everything that was necessary for the protection of the public or the accommodation of owners. These things were used sometimes to make a claim for compensation, and this was also provided for. As far as the Company were concerned, he believed they had done everything for the accommodation of owners and so as to protect the public from injury; they had fulfilled all the terms, and would continue to do so, never mind what the obligation was. He understood that they would take the larger sense, and do everything that was necessary. He had said that the Act of Parliament was based upon a Government Report, which was in the Parliamentary Papers. This Report made the Government promoters of the undertaking in this sense—they called it into existence. They mooted a company; they induced persons, by showing them advantages to be gained, to form themselves into a company to make the railway. The Royal Commission on the Main Line Railway went into the whole cost of the undertaking. There was an estimate of returns that would be made, the trains that were to be run, and a variety of other things, and the cost of the items. These were so carefully considered that they felt assured that they would be able to construct a railway sufficient to meet the then requirements of the Colony for a sum not to exceed £700,000. The Company was formed, and as far as he could see the Report was fully borne out; but it showed how very fallacious statistics were. Of course he well knew they were only an approximation of the cost as far as human foresight could accomplish; but still as a matter of fact Government statistics were very unreliable—they were always exceeded—always fallacious more or less. They were painted and made to look well. This was very natural, and he did not want to say it was improper; they were perfectly justified in going upon the statistics and estimates that were presented to them, and which they considered reliable. At all events, this undertaking was launched by the authority of the Government, and he would read the financial result:—Receipts from goods traffic for 100,000 tons, at an average charge of 5*d.* per ton for an average distance of 20 miles, say, £41,000; receipts from passenger traffic for 14,000 journeys between Hobart Town and Launceston, at an average of £1 10*s.* each journey, say, £21,000; for 40,000 intermediate journeys, at 10*s.* each journey, say, £20,000; for 60,000 short journeys from each terminus, at 2*s.* each journey, say £6000. Then came a very curious item—a benefit that the Government would derive from the undertaking. It is this: the saving to Her Majesty's Government in the conveyance of mails, in matters connected with the judicial and police departments, and in the maintenance of the main road, say £12,000. This was a direct benefit which the Government and the Colony were to receive from the construction of the line. It was rational to suppose that that was a good reason for sanctioning a contract to be made to induce the Company to undertake the line. He quite understood that on these lines: it was not only to bring in £88,000 of revenue to the Company, but besides that it was to be a gain of £12,000 to the Government in money by a saving in the conveyance of mails.

His Honor the Chief Justice said he could not see that the report to which Mr. Fooks referred had anything to do with the issue.

Mr. Fooks [continuing] said as far as he was concerned he did not want to argue that the contract was not self-interpreting. He did not want to go beyond it. But with regard to the issue raised by the Attorney-General of this Colony and the dispute beyond the contract, he contended that he was entitled to refer to all contemporaneous documents in order to explain ambiguity, and would ask His Honor to allow him to read from them. [Proceeding]: Then the working expenses were taken at 50 per cent. on gross profits, £44,000; interest on capital (£800,000), at 6 per cent., £48,000. That came to £92,000. There would then be £6000 for profit, *plus* interest at 6 per

cent. on the estimated outlay. The railway cost had been £1,050,000. If he had a proper profit and loss account he was entitled to take that interest into account and that capital into account. It must be taken into account if he had an elaborate system of accounts such as there would be in a mercantile undertaking. Issue had been raised upon this : the Government had an interest in the profits contingently, though they did not spend a single sixpence towards the capital of the railway or its construction. This, however, did not entitle them to interfere in the working and administration of the Company. The Government paid interest on the amount up to a certain sum expended on the construction of the railway, and they were to be participators in the profits in the undertaking. According to all commercial principles they were therefore partners, but that gave them no right to interfere with the administration. It was never intended by the contract. It was intended also that the Company should have both interest on capital and profits. It was perfectly manifest and clear that that was the thing intended from the beginning, and was consistent with the contract and the report upon which it was based, and upon which the Company was formed to undertake the construction, maintenance, and the working of this particular railway. The undertaking of the Company applied not only to this railway, but generally to railways in Tasmania. The Company was a "going" one, and could erect branch lines and make new lines. Of course they would have to get authority for this, because at present they had powers to construct the Main Line Railway only. But if the Company, instead of being cramped and hindered, had been helped and facilitated, for all he knew, the English people—capitalists—might have made all the feeders for this line by this time. He could see no reason why such a profit should not have been made out of the railway—if the Company had been treated in such a manner as he had indicated—that English capitalists would have seen that there was scope enough in Tasmania for the investment of capital. Instead of there being only the present reports concerning the feeders of the Main Line, capitalists would have made them for the Colony. He granted that these observations were not much to the point, but he could not refrain from making them. The Act of Parliament was then based upon the report, and the Company was formed in England. Then they got an amending Act, and in this Act and afterwards the subsidy was fixed to be embodied in the contract. The Government were the first promoters of this Company as much as any persons who were behind. There must be some persons to suggest the scheme. The Government suggested it, and were, therefore, the persons really engaged in promoting the Company. As far as the constitution of the Company was concerned, they would find when they came to the Contract that it was to be incorporated in Tasmania ; and then they would have to look at its constitution in order to see what its status was, what were its powers, what were within its powers, and what were outside its powers. The first Act stated, "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 any point on the Launceston and Western Railway, in consideration of the payment by this Colony to such person or company of a sum not exceeding £300,000, or of an annual sum not exceeding £25,000 a year for a period of 20 years." "Oh!" said the Company, "what are we going to get out of the traffic? Will you give us a guarantee of the interest on our outlay." "Yes," the Government said, "we will get an amended Act passed to guarantee you the interest." The amending Act was passed with this guarantee: "In consideration of the Governor of this Colony guaranteeing to such person or company interest at the rate of £5 per centum per annum upon any sum of money not exceeding in the whole the sum of £650,000 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 a 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. Such guarantee shall continue for thirty years from the date at which the said line shall be open 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." This enabled the Government to give the Company interest upon the capital expended, and the rate of interest was limited to "any sum of money not exceeding in the whole £650,000." That was, in point of fact, a guarantee of interest upon £650,000 of the capital expended—not upon the whole capital expended, but upon a sum not exceeding the limit se down. It was part of the receipts of the Company—an element which was to be taken into the profit or loss of this undertaking. He was willing to concede that. But there was no power in the Common Law Court to take accounts. He would ask His Honor if he would give them directions, or, if he would not, to take a note that he did not give them. He did not see himself how the thing could be done. His Honor was simply on the legal side of the Common Law Procedure Act, and could not turn it into an equity suit. The case had been wrongly brought on the Common Law side. He had found great advantage in exercising the power he alluded to in the County Courts in England, practically turning a Common Law claim into an equity suit, and settled it to the great satisfaction of all the parties.

His Honor concurred in the opinion that it would have been very much better and more convenient, and was astonished to find that the case had not been brought on the Equity side. But as to how far amendment would be necessary he would see as the case developed.

Mr. Fooks said his object was to avoid a multiplicity of suits—as it was he did not see the end

of it. He contended that if there were any accounts to be adjusted, this should be done by the Company, and it was a misapprehension of the contract to say otherwise. Sub-section 3 of Clause 3 was very important. It read: "That should the profits of the railway arising from the traffic thereon amount in any year to less than five 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." That was the profits of the undertaking arising from the "traffic receipts," and whether they applied that to the maintenance, construction, and working, or to maintenance and working only, it was profit arising from the "traffic receipts." He granted that the Government had the benefit of more than the traffic receipts—the Company had not been narrow or stingy—nothing had been omitted. It was clear that profit arising from traffic receipts should be read into the contract. They would see that this was repeated in Sub-section 5, the effect was to make the Government sleeping partners in the railway—partners in the participation of profits, but giving them no right to control the management or working. The Company fulfilled their obligation, and did a great deal more, putting the Government in much more favourable circumstances. Instead of a minimum train service of four trains daily, that number had been very largely exceeded, the Company now working 22 trains each day, and no engineer would tell them that the rolling stock was not lamentably insufficient for the proper working of the line for the purposes of profit and economy. With a view of giving all that station accommodation and exigencies of traffic which was necessary to meet the growing circumstances of the Colony, he did not see why the Company should not act as they thought best, and be allowed to make provision for the future. It was not reasonable to suppose that they would spend the money foolishly. They would only do what was reasonable and necessary for the purpose of earning money. They had to provide for the traffic, and the Company might go on for everlasting. It was, to his mind, a contract in perpetuity. They were not making a railway line which was to last for thirty years only—it was to run on in perpetuity. Therefore, the Compay had to consider not merely what the present exigencies were, but what they might be in the future. He did not mean that they were to provide for these in some absurd way, but they had to consider, as reasonable business men, what the wants of the line might be in the future. They had to put this line in such a condition that it would reasonably serve the Colony. So long as the Railway might continue they were bound to see that it served the interests of the population. The fourth clause of the Amending Act, therefore, provided that "the 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." The object was to secure not only efficient construction, but also efficient maintenance and working. It was well explained what had to be done in Clause 6 of the contract. The Company was to keep the Railway for all time and in perpetuity in good and efficient repair and working condition, and in case it appeared that it was not so keeping the line in good repair and working order, the Government could itself step in and effect repairs and recover from the Company in any Court of competent jurisdiction. There was a complete remedy for any breaches on the part of the Company provided under the contract. But they said, "we don't want to apply that remedy; we don't want to make any demand whatever against the Company; let us simply say we won't pay, and see what the issue will be." They had done the same thing before, and had eventually been made to pay, and now here they were again on almost the very same sort of issue. For all he knew they might yet have to try the matters involved in the contract again on the Equity side of the Court perhaps. There was a state of things! And who caused it? Why, the Government, which assumed to itself the power of putting to the account of revenue charges which were fairly chargeable to capital, simply for the purpose of making profit. That was an absurdity. Another absurdity was this: it was said suppose the Government purchased the Railway, then they would have to appoint competent men to ascertain the value of the railway as between the Government and the Company. They said, "if we allow this expenditure to take place, it will enhance the price we shall have to pay." It would have no such effect. The value would be fairly ascertained, and the Government would have to pay only the price agreed on.

DR. MADDEN: Yes; but our contention is that if all these new works are to be constructed out of revenue, we shall have to pay twice over for it.

MR. FOOKS: So far they had paid nothing for it. They had subsidised the Company to a certain extent, and the Company had undertaken the construction, maintenance, and working, and the entire expenditure. The Government had paid nothing, because they claimed they had the power to deduct interest, and they had not paid anything. He was glad his learned friend had mentioned that, because it was another fallacy. He should be enlightened if they could show that Government had paid anything towards the construction, equipment, and working of this railway. They seemed to regard the contract as a sort of guarantee of profits; but that was a fallacy. They had paid nothing towards the construction of the line, and now they refused to pay the Company their subsidy. They had made no contribution whatever towards the expenditure—they had deducted it from the subsidy. They participated in the profits of the thing, and denied them the benefit of their subsidy. It was not likely the Company would ever have undertaken the construction of the railway without the benefit of the subsidy; but, as far as construction was concerned, Government had never contributed one farthing towards it. Their subsidy had no doubt helped the Company to carry on, but Government was not entitled to represent that as a contribution towards the construction of the railway. It was a contribution to those who undertook the railway, and they were entitled to use it in any way they pleased. His learned friend said they had

paid, or would have to pay, twice. He should like to know when they had paid once, much less twice. They gave it as a subsidy when they did pay it, but not in any way as a contribution towards the construction of the railway. It was to be taken as interest measured by a certain amount of capital. It was said *Timeo Danaos et dona ferentes*, but he should not say that—his learned friend's suggestions, if inconvenient, reminded him of certain points, and he was glad he called attention to them.

DR. MADDEN: I don't think I shall make them any more.

MR. FOOKS continued: He now came to the incorporation of the Company. It was an English Company, but it was to be incorporated in Tasmania, and was so incorporated by "The Amending Act, No. 2," of 1872, under sections 4, 5, and 6. The Company incorporated in England by the name of the Tasmanian Main Line Railway Company (Limited), under the Act of the Imperial Parliament called "The Companies Act, 1862," may sue and be sued in its corporate name in Tasmania, and this definition included the provisions of their own Companies Act of 1869, and the liability of and proceedings against the said Company shall be the same as if the Company had been duly registered in Tasmania under the provisions of "The Companies Act, 1869." It came in and was registered under that Act, and it was bound by that Act and its deed of settlement. They must regard its constitution as regards its shareholders and as regards the public *quoad* the public—meaning simply that nothing could be done *ultra vires*. The Company had done all that was possible, and had found the money to fulfil their obligations. It was the same now as under its deed of association, and had undergone no change except in its directorate. When it found itself in preliminary difficulties its bondholders gave up their interest, and it went and borrowed the money and finished the railway. The Company, he contended, had fulfilled all its obligations, and if the railway was not completed and equipped as well as it might be, that was a matter of maintenance and working, which they had only to provide according to the exigencies of the colony—that was what the thing meant. This Company was incorporated in England under Sections 34 and 35 of "The Companies Act"; it was to have an office in the colony, and that provision was under the Companies Act of 1869, and it had a right to come and take the benefit of that Act. He now came to a very important provision in reference to the question of capital—a provision which was very important, because it seemed to have been overlooked in the complications that had taken place, especially in regard to what was in the agreement. It was said that the Company was bound to provide the whole money capital therein specified to entitle them to interest; but they could say in reply, "You have treated the whole money capital of the Company as required for interest as if it had been subscribed and contributed." He did not know what the amount of capital actually taken up might be, but as regarded the interest to be received by the Company, the whole amount of the capital had been admitted to have been subscribed. Whatever obligation might have rested upon them under the Lands Clauses Act, they were excused from by the amending Act of 1872. They were not only excused from those obligations, but it was admitted that the capital had been subscribed. Section 6 of the Act said: "So much of Section 8 of the "Lands Clauses Act" as requires that in certain cases the whole of the capital or estimated sum for defraying the expenses of the undertaking shall be subscribed under the contract." Perhaps that meant the whole of the capital or estimated sum as stated under the different Acts—there was an alternative meaning—"the whole of the capital or estimated sum for defraying the expenses of the undertaking shall be subscribed under the contract binding the parties thereto (and so on) shall be deemed to have been complied with in all respects by the Tasmanian Main Line Railway Company, Limited, and Section 9 of the said Act shall not be deemed to be applicable to the said company." Therefore the whole of the capital which was required for the construction, maintenance, and working of the line, and everything required for the purposes of the undertaking, was to be deemed by law to have been subscribed. If, then, they had opened a capital account, what would it have come to? It was not required for the purposes of the company, because the whole of the capital was to be deemed to have been subscribed.

DR. MADDEN: Yes, but only for the purposes of "The Lands Clauses Consolidation Act."

MR. FOOKS contended that, while it was only for the purposes of "The Lands Clauses Act," it was not now an obligation upon the Company to have capital. The section of the Act meant for all purposes, and could not be limited in the way proposed. It was a recognition by the Legislature of the Colony that the whole of the capital had been subscribed. He had heard comments made to the effect that this Company was only a contractors' Company. Suppose it was?—everything had been done that the law required; and, if the contractors had not been paid in money, they had been paid in shares. He supposed the Company had the power of giving shares as money's worth; and, depend upon it, the Company took care to get everything done as cheaply as they could. He was not bound to show them the contract; it was enough for him that he had got the capital subscribed in the mode required by "The Lands Clauses Consolidation Act." Under the Act he had quoted, the money was to be deemed subscribed; and, for a very good reason, the Company had the power to give shares for services rendered. They had the worth of it in the construction of the railway under the contract. They got their money's worth as between the Government and the Company. They might be perfectly certain that the Company did not give away its capital for nothing. The railway represented the capital expended. Well, construction had now ended, and maintenance and working had begun. They came now to a new state of things; and the question was, what were the profits of the undertaking arising from the traffic upon the railway?

HIS HONOR asked whether this provision was not inserted in the amending Act with reference

to the Lands Clauses Act, in reference to the taking up of land, that they might be considered to have all their capital subscribed?—was it not only for the purposes of the Act that the money was to be deemed and taken to be subscribed under this Act?

MR. FOOKS: That was very likely; but it was a recognition by the Legislature of a fact, and it could only be taken for all purposes. Government were not entitled to say it was not for any other purpose.

HIS HONOR: Was not this consistent with the fact that they had received not only enough for construction, but more than enough?

MR. FOOKS: Yes; we have received the whole of the capital required for construction. Their case was that they had expended in the construction of this railway not only the capital stipulated for, but a much larger sum—borrowed money, no doubt—but money which they had the power to borrow, and which Government knew they had the power to borrow. They had borrowed a still further sum of money in order that the contract might be fulfilled in its integrity. They had been met in rather a carping spirit, and, now the railway was constructed, Government said, "We won't pay." Well, he was sure no such thing was contemplated by the Company. He could show from their own public accounts that £1,150,000 had been expended on this railway, instead of only £650,000. They had expended £1,150,000 on the railway, and, he contended, they were now entitled to interest under the contract *ex* profit. There could not be profits on an undertaking of this sort until it grew; and if this railway was allowed to go on, and if maintained efficiently with proper and efficient rolling stock, proper station accommodation, proper sidings, and proper improvements generally to meet the growing traffic, it would be for the general interest, and the line would become highly valuable. There could be no doubt about it. There could be no doubt that, for all practical purposes, under the amending Act the capital was to be deemed to have been raised. He suspected the Government would not have entered into such a contract until they had made enquiries and seen that the Company was in a position to fulfil the obligations of the contract. And how did it do so? It had raised the money; it had been paid into a bank, and for the purposes of construction expended. Of course, there was one sum which was taken as construction—a sum of £25,000, which was allowed for preliminary expenses—that was treated as construction, and this and everything showed that the Government were well aware of the intentions of the Company, and recognised the mode of construction of the railway. The obligation of the Government under the Contract was to pay interest on a sum up to and not exceeding £650,000; but this did not give them the slightest right to control construction. All the power they had was to take vouchers for the expenditure. If the Company did wrong, all they could do was to come there and ask His Honor, on the equity side of the Court, to tell the Company what to do if there was any dispute; and he (Mr. Fooks) should have thought there could have been no difficulty about the matter. He should have thought any ordinary skilled man of business would have been able to settle the meaning of the Acts and the contract. Whether they could do it now under the present proceedings, or what the result might be, he did not know. His Honor would yet have to consider what would have to be done in the shape of amendment.

(At this stage the Court adjourned until two o'clock.)

AFTERNOON SITTING.

MR. FOOKS continued: He would now draw attention to the constitution of this Company. The certificate of incorporation would be handed in. The Company was incorporated on the 21st September, 1870, under the Tasmanian Main Line Railway Act and the second amendment Act, and the contract followed upon those Acts. The articles of association of the Company set out that its object was to undertake to make a railway between Hobart Town and Launceston or to some point on the Launceston and Western Railway. The original capital of the Company was one million sterling. In relation to that part of the Company's constitution the articles had since been altered, in consideration of the bondholders giving up their claims to interest, and by an Act of the Imperial Legislature the Company received power to raise a further sum of money on loan for the purposes of the contract amounting to £100,000. There had been altogether £1,150,000 expended in construction—something very much more than the contemplated £650,000 or the £800,000. He referred to the 14th Section of the articles of association, and said it was a question whether the bondholders were represented on the part of the Company now as they ought to be. Of course, if they were going to interfere with the position of affairs, it would be supposed that it had been assented to by the bondholders, and it did strike him that they were necessary parties here. Certainly, by representation they must be considered as parties.

HIS HONOR: They do not claim to interfere in any way. It is a matter as to the construction of the Contract.

MR. FOOKS said if they went on the intention of equity it was because the Government had claimed profits that they were there. The Government said they were entitled to a balance of profits over 6 per cent., and that was a right of interference—a right to say we shall not pay the subsidy which the bondholders hold as their security. It was a question with him whether all the parties must not be separately represented.

HIS HONOR: At Common Law we have only to carry out the contract as between A and B.

MR. FOOKS: But the question would arise on the Equity side of the Court.

HIS HONOR: Yes; but at Common Law we cannot take any notice of it.

MR. FOOKS: We have what is known as the third party clause at home which entitles all to be represented.

HIS HONOR thought they ought to have it here, and it was a disgrace to Tasmania that they did not have it.

DR. MADDEN: I hope Your Honor will not say that too readily.

MR. FOOKS said it had been most useful in England in getting all the persons before the Court. He did not know how far the powers of the Judge extended on the Common Law side in this Colony; and, whatever he might suggest, he desired it to be understood he in no way presumed to dictate to His Honor as to what should be done. He referred to the powers of the Directors under the deed of association. The capital of the Company had been paid up; for all purposes of the contract it was treated as paid up; and they had in addition a certain amount of share or debenture capital. All this must be taken as capital expended, or moneys actually expended in construction of the railway. It was a large sum, and had actually been paid in, as he had told them, in money or money's worth. This had a very significant bearing upon the claims and the reading of the contract, that the whole of the capital must be taken as paid up. It was not only that they were absolved for the purposes of "The Lands Clauses Consolidation Act," but it went so far as to be an affirmative that the whole of the capital had been paid in.

HIS HONOR: Do you carry it to that extent?—that not only the sum of £650,000 had been paid in, but that the balance expended was to be taken as paid in, either in money or money's worth?—has that been so?

MR. FOOKS: Yes, that is the fact.

HIS HONOR: You put it far beyond the question of the recital in the Act. You say that all this capital has been expended.

MR. FOOKS said the question was not whether the contractors had put a certain amount in money to the affair. The Company had made as good a bargain as they could, and great care was taken to tie the contractors down. As a matter of fact, the contractors had made a loss over it. Neither Messrs. Punchard or Clarke had made money out of this railway, but the Company had made them do the work, and had in everything done the best they could. Mr. Clarke had money, and lost the whole of it. Mr. Punchard had nothing. The Company had expended all this money, and now they could not get the subsidy. This was a nice state of affairs; but, unless this had been, he should not probably have had the pleasure of being able to make the acquaintance of Tasmania.

DR. MADDEN: You will be able to raise more capital now.

MR. FOOKS: Oh, yes, if the Judge says so; but the question did not arise at the present time. He quoted from the deed of association of the Company as to the mode of adjusting profits and a reserve fund. Referring to the question of profits, which were to arise in a particular way, he said the shareholders had never received one shilling dividend on their capital, and even their creditors had not been paid interest—those from whom the money had been borrowed. That was how the thing stood. He quoted at length from the deed of association as to adjustment of profits and keeping of accounts, and said all these things had been provided for in the constitution of the Company. All stipulations as to accounts to be kept and adjusted were provided for under that constitution, which was well known to the Government, and acted on by the Government; and all the Government reserved to themselves was the power to examine these accounts, to audit them, and to see that they were properly vouched and verified: beyond that the Government had nothing whatever to do with them. The Government had no right to dictate what items of expenditure the Company should carry to capital or what to revenue; not that it would make any particular difference, because that was simply a mode of keeping the accounts. For the purpose of the accounts to be rendered—which was an abstract of receipts and expenditure only—it did not at all follow that capital was the same thing as construction. It did not follow that because they might debit capital or revenue with a particular item that it must enter into the profit or loss of the undertaking. He mentioned this to show the powers of the Company and of the Government of Tasmania as regards accounts were no different from those as between partners in a business, and correct accounts would have to be entered into. He would now go to the next Act of Parliament, which was material—that in which the opinion of the Attorney-General, Sir John Holkar and Messrs. Dodd and Benjamin was referred to—the Act 42 Vict. No. 5. He did not know exactly what the contentions of the Crown would be—what horse they intended to ride. Perhaps they intended to rely upon the third plea, but he was prepared to meet any of them. He did not think there was much matter for oral evidence except with regard to that sum of money by way of subsidy, and that was shown in the balance sheets which were delivered. The Government said there had been a profit; but there was nothing of the sort, except the sum for profit stated in the accounts. They were bound by those accounts, which should not have been rendered. The Company had been in straits and very much embarrassed, and although there had been a disclaimer that there had been any intention to embarrass the Company, there was no doubt that the action of the Government did produce that result. It was all very well to deny this, but it was manifest that they were doing the very thing they professed not to do. They were there to listen to facts and to deal with results. The Government would not and did not pay, and they found themselves wrong. In the Act 42 Vict. No. 5 it was stated that the Government of Tasmania submitted the case to counsel in England. These were Sir John Holkar, Her Majesty's Attorney-General, and a man of great eminence in England; Judah Philip Benjamin, of world-wide reputation; and Cyril Dodd,

the latter of whom wrote an independent opinion, in the first instance, in support of the Government, but who afterwards made the *amende honorable*. The joint opinion of these was that "the Company were bound to run the trains through to Launceston; that the Government was bound to pay the guaranteed interest from the date at which the line was open for traffic from Hobart Town through to Launceston, which appeared to them to be the 1st November, 1876. The said counsel further advised that the facts, as stated to them, showed 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 their judgment, the line was recognised as the line bargained for, though all rights to complain of its defects were reserved by the said Government." There had been substantial evidence that the contract had been complied with, and although there might have been some little shortcomings, they would form no ground for the Government to refuse payment of the subsidy.

The CHIEF JUSTICE: I do not see that the opinion of counsel in England can be the slightest good in this Court, and as to a matter we are not dealing with.

MR. FOOKS would deal with the matter broadly. He was quite satisfied that the Government deferred to that opinion. They had refused to pay, and the Legislature made this appropriation of the expenses. Now, he was going to ask the gentlemen of the jury to do the same thing, and to show to the Colony at large that the right course was to fulfil the obligations they had undertaken, and not to try to escape them. He would recommend any man who had legal obligations to use a certain amount of discretion, and not strain them, but to deal generously. That spirit had been acted upon by the Company, and the Government should have had the generosity to act reciprocally. The Company had given them more than they should have given them under the Contract. They had not charged into account the interest upon their outlay; they had not even brought in the interest owing upon their debentures. They had not taken those liabilities, all of which ought to have been taken into account. All these concessions had been made, and they had given the Government these benefits in the accounts which were rendered, but which should not have been rendered; but now they would give them their pound of flesh and no more, and till he got an adverse decision from a judicial tribunal the Company must be guided by the opinion of their counsel; and it was understood that they were acting upon the general consensus of opinion. If it could be made out that the Government were entitled to more than the profits from traffic receipts, he would like it to be shown in the contract. He would listen with amazement to hear it stated that they were entitled to more. Of course, he would listen, to hear what he could not see. The Act called the Disputes Settlement Act was to do the thing that they were now doing. A supplication was filed—in fact, there had been three—and he believed an action was instituted that was altogether wrong, and the Attorney-General advised the Government to withdraw it, which they did. The first supplication was filed in the Supreme Court of Tasmania, under the provisions of the Crown Redress Act, by which "The Tasmanian Main Line Railway Company, Limited, claimed from Her Majesty the Queen £28,258 10*s*. 2*d*., alleged to be due by Her Majesty for interest and damages under a certain contract, dated the 15th day of August, 1871, for the construction and maintenance of the Main Line Railway between Hobart Town and Launceston." As far as he could see, the Company were entitled to every farthing of that amount. Then a second supplication was filed for the sum of £2125 and interest, under the same contract. If this case were not dealt with so as to settle the matter in dispute for all time upon the construction of the contract, they would have another action against the Government, and there would be a repetition of the Disputes Settlement Act. It was agreed that the accounts of the Company were to be settled upon the system of yearly balances, but not a word was said about a reserve fund. There ought always to be a depreciation fund, and he contended that they could not strike any balance of profit and loss unless they had this fund; they could not have profits until they had taken into account depreciation and had a reserve fund. The agreement as to the accounts was, "that in the accounts of the said Company, to be rendered in pursuance of the said contract, the revenue and expenditure of the Company, for and in respect of the maintenance and working of the said railway, shall be adjusted on the principle of yearly balances, and that the quarterly statements provided for by the said contract shall be rendered and audited as heretofore, but that the balance of profit and loss shall be struck yearly." And so they ought to have been; it was quite necessary that this should be done. But adjusted by whom? The quarterly statements were to be rendered and audited as theretofore; no change or alteration was to be made in any shape or way. It did not mean that the Government were to take the position of the directors of the Company, to say what should come out of capital and what should come out of revenue. What had the Government to do with that? All they had to see was whether the expenditure was taken into account; whether there was anything in the accounts that was not expended for maintenance or working. They could say, "Is there anything in these receipts?" Well, they had given the Government more than the receipts. Every farthing had been rendered; they were all there; but whether the accounts had been adjusted in the sense that there might have been open accounts between the Company and those with whom they had dealings was not very material. The accounts had to be adjusted as soon as they could be. Of course, it was necessarily to be implied that in any proper keeping of accounts the balance of profit and loss ought to be struck yearly. But who was to strike it? There was no change; the Company themselves were to ascertain what the profit and loss were yearly. The Company ought to have raised a profit and loss account; they had raised it

in a limited way by putting down all the expenditure on account of maintenance and working, and not only all the receipts, but more than the receipts, and the balance showed a little profit, which was shared in by the Government. He was speaking of the undertaking as including construction, working, and maintenance, and took the profit upon the working, that was, a profit after the disbursement of expenditure or maintenance and working, as upon the carrying on of the railway. The term working of the railway might be used in a very limited sense. He did not understand it as working a contract. He could see a sort of contention looming that it was to be confined into working the traffic only—the train service; not working the undertaking, not the various obligations of the Company. Maintenance to a certain extent must include a certain amount of construction, and he defied them to maintain without doing a variety of things in the shape of construction. Did the Government mean to say that construction was not needed, and that the capital account was to be kept open? His impression was that the Government would not raise any such contention. If so, he was prepared for it. He wanted to show the futility of an argument which said, "You cannot make a profit by simply transferring from revenue to capital." They could not make a profit without taking the whole of the capital into account, without taking the interest on that capital, and the construction, maintenance, and working into account, and also the amount that was paid to the Company by way of subsidy by the Government. That would be part of their receipts, and part of their receipts, not from the traffic, but part of their general receipts—the profits of the undertaking—all would have to be taken into account in the profit and loss account. It was to the interest of the Company, and the Government also, that the Company should stand well with the Government, and it was wrong that they should have been crippled by the refusal to pay the subsidy right or wrong. The Company had been willing to abandon anything that it possibly could for peace; but the time for peace had gone, and they must have the whole thing. Things were different now, and they would not mince matters with the Government, but would stand upon their rights and say, "you may take your pound of flesh, but nothing more." The Disputes Settlement Act stated that "it has been agreed by and between the Governor of Tasmania, acting for and on behalf of Her said Majesty and the said Company, that the sum of £14,654 0*s.* 10*d.* shall, subject to the approval of Parliament, be paid by the Treasurer of the Colony of Tasmania to the said Company out of the Consolidated Revenue Fund of the said Colony; and that the said Company should be permitted to retain out of any profits arising from the said railway, for and during the year 1882, the sum of £2125, without interest; and that such payment to and retention by the said Company of such sums of £14,654 0*s.* 10*d.* and £2125 shall be accepted by the said Company in full satisfaction and discharge of all claims, &c." The Government might say they made a concession to the Company. He was not there to complain of that. He only mentioned it as what he might have to expect; and he did not intend to cast any reflection upon any individual in speaking of the officers of the Government in their official capacity. They made mistakes in the construction of the contract with reference to what they thought was the best policy for the Government to pursue. They had been unjust towards the Company and unwise, looking at it from a Government point of view, in not allowing it to develop the railway according to the wants of the Colony, and forcing it with litigation and compromise. He felt that Her Majesty would do right, under the guidance of the Judge, and to do right was to decide against the Colony. The gentlemen of the jury were all taxpayers, but he felt they would throw that consideration aside. They were charged with a very stern duty; there was no doubt that every juryman had an interest in the taxation of the Colony, and one might say, "I shall not do this act; I will be taxing myself;" but such a suggestion he would treat with scorn. Bias would be thrown to the winds, and he knew perfectly well that they would show to the world that wherever British justice was administered it was making world-wide progress, and was an example to all nations. How had England kept her faith and reputation? He would not call this reputation, but in one sense it was reputation, being the refusal to pay a debt. They came to law for it, and that was just how the thing stood. Were they going to say, as he had heard it said, that they were prejudiced in favour of the Government? He merely mentioned this as a caution, which the Judge would mention in due time, though he felt it right to say that they did not need that caution. They sprang from English ancestors, and English feelings would guide them in their decision, though that decision might be against the Colony, and they might have to contribute to the outlay; for, after all, it was the Colony that the Government were acting for through their representative institutions. He was satisfied that the jury would not be influenced in any way, but would scorn such an inference, as he had scorned it when the suggestion was made to him that the Company would not be treated fairly. He would not for one moment consider the suggestion that there was any want of faith in the Jury or the Judge, and thought that even the Attorney-General, who perhaps had never heard such arguments advanced on the side of the Company as he had heard that day, would feel that they had right and justice on their side. But this was only a digression, and he would return to the argument. Working the railway, he contended, included maintenance, and maintenance meant a certain amount of construction: there could be no doubt about that. Taking the different words of the Act of Parliament and the different words of the contract, they all meant the same thing; the railway meant the undertaking; and he did not care how they put it, whether it was the profits arising from receipts of traffic or from the receipts of the undertaking, it was mere hair-splitting, and so there was no distinction between them. He gathered from the third plea that a distinction would be drawn, but he said the working of the railway was, in point of fact, the working of the undertaking. Although he did not see this distinction in the plea, he saw it in the correspondence, and was only preparing the jury for it, and asked them if it

were done not to listen to it. It was mere hair splitting, and hardly worthy of being listened to by commercial men and men of business. All the questions as to legal liability under the contract were disposed of by the Act of Parliament to which he had alluded, under the advice of the most eminent counsel they could get. The maintenance and working of the line meant extension of station accommodation and a variety of other accommodation. There was not a bit of the railway that was not subject to wear and tear more or less. It must by length of time wear out—the influence of the elements would have that effect—and hence there was maintenance, construction, and a variety of things to be done. Fencing and other things wanted improving, and he understood that there was a deal of improvement required as traffic developed. He would not believe, until he heard some skilled person tell him, that there was nothing of that kind required. Whether it was chargeable to capital or revenue was not the question. Upon that point there ought to be room for oral evidence ; but he must appeal to his learned friends, and say, "Do you think it is a case for oral evidence—can it not be left to the common sense of the Jury to say what are maintenance, working, and improvements, what is construction, and what the obligations of the Company are?" The opinions taken on the point were not worth any more than that of any gentleman in the streets if asked, "What is your opinion of the liability of the company as to what should be charged to capital and what to revenue?" A Royal Commission had been issued, and his learned friend who represented the Government upon that Commission, when the question was asked, "Ought this to be charged to revenue or capital?" objected to that question, and very properly too. They all said, "These are expenses in connection with the maintenance and working." He had no doubt that some questions were asked in cross-examination to make a man look foolish and to hold him up to ridicule, and that was precisely what was done. One of the witnesses said that it was a question for an accountant. He had got this evidence to produce, and did not suppose that his learned friend would object to it now as a question germane to the issue ; still, at the same time he did not want to say that there was any change of front, but it was very curious that his learned friend was anxious to get it in.

Dr. Madden : The witnesses are not here.

Mr. Fooks : I cannot call these witnesses into Court, and that, no doubt, is the reason why my learned friend does not put it in. As far as my views are concerned, I have not the least objection to its going in, with all the ridicule that, with considerable skill, was heaped upon the witnesses by Dr. Madden.

His Honor said the difference as between the learned leaders to the document in question was a matter that might be settled between themselves.

Mr. Fooks (continuing) said he would prefer to have the evidence put in, as he could not call the witnesses that were examined. There were very few questions for the jury to consider, excepting the one he had alluded to, and it was for the other side to say that the expenses were not expenses for maintenance and working. They had not raised the question in their pleas, the issue upon which evidence was unnecessary. In speaking of the Commission, he had perhaps gone too far in saying what the evidence was ; he ought perhaps to have simply stated that they were examined. He now came to what he called documentary evidence ; but as he and his learned friend (Mr. Miller) had not had an opportunity to consult together carefully as to what documents would be handed in as evidence, he had merely acted upon the spur of the moment. He and his learned friend were not at one as to the documentary evidence, and he would like an opportunity for consultation.

The Chief Justice : What you really ask for is an adjournment.

Mr. Fooks : Yes, Your Honor; it would facilitate matters, and save the time of the jury.

His Honor : If you want time for the purpose of consultation and to look up documents there is no real objection to the adjournment.

Mr. Miller said they were more at one than his learned friend thought ; but there had been great inconvenience experienced with regard to the evidence. An adjournment would be useless at that moment. It was almost better that they should tender some documents, and get His Honor's opinion as to whether they were acceptable. He would propose to tender the Railway Commission. Then there would be a letter from the Premier to Sir James Milne Wilson, almost contemporaneously with the signing of the contract.

Dr. Madden : Your Honor has said that you consider there is no objection to adjourn.

Mr. Miller : I merely propose to submit these documents now for the purpose of shortening time.

His Honor said it would be better to adjourn, as it was evident the Counsel for plaintiffs were not at one with each other.

The Attorney-General said before the adjournment took place he would ask that the arrangement come to between the parties before His Honor in Chambers, on the application to amend the pleas, and whereby the amount was reduced, should be put before the Jury, as Counsel had omitted it in his opening remarks. He wanted this put clearly before the Jury.

His Honor : The agreement will be carried out in its entirety to-morrow.

The Court then adjourned till next day.

WEDNESDAY, 8TH MAY, 1889.

The Court met at 10·30 A.M., and the Jury having been called over—

MR. FOOKS said: On the previous day his learned friend, the Attorney-General, had referred to something he had omitted in the opening address, and that was some transaction which had taken place before His Honor in Chambers, and which had the effect of reducing the Company's claim for interest, which he had read from the figures as sent to him. He did not know what had been done, or whether an order had been drawn up in any way, but he understood from his learned friend, Mr. Miller, that it had all been arranged.

MR. MILLER: Yes, it has all been arranged, and a payment of £289 had been made.

MR. FOOKS would leave the matter with that explanation. He left off yesterday to consider evidence to be formally adduced. His learned friend, Mr. Miller, had prepared a list, and would submit to His Honor the documentary evidence they intended to give. They were also going into some oral evidence in anticipation of the case to be opened by the other side, subject of course to His Honor's direction. His opinion was that there was no room for oral evidence. While there were items of account that had been furnished, it was said some of the items were not due to maintenance and working, but to construction. It might be open for the other side to say we take exception to these, although the issue was not raised by the pleadings. For that reason they thought it well to call oral evidence in anticipation of the case which the Government might open on these extraordinary pleadings. They thought it prudent to go into evidence now, unless His Honor should think differently, in which case they would leave it for rebutting evidence. It was for the other side to prove their case if they could. They were quite prepared to meet the matter in either way. His Honor might say he thought it a question to be gone into by rebutting evidence, if so they were ready, or they were quite prepared at once to go into evidence in chief.

HIS HONOR: In other words, you go for £32,500 per annum interest, and the other side can give evidence to show that there are profits that will reduce the amount.

MR. FOOKS: Well, yes, if you say they are going outside the pleadings and the accounts. I think, subject to Your Honor's better opinion, that as the—

HIS HONOR: You really protest too much, Mr. Fooks.

DR. MADDEN: He is trying to get a travelling opinion from Your Honor. Better go on with the case, and deal with all those things as they arise.

MR. FOOKS: You think it better to go on, open and dispose of the whole case?

HIS HONOR: When I said you protest too much, Mr. Fooks, I meant too great a respect for my opinion.

MR. FOOKS: I merely asked was it a case for oral evidence?

HIS HONOR: Carry the case as far as you can, and they, of course, will answer you. It is an open question at this moment, and every contention on the pleadings may now be raised; but we shall focus it into a very narrow question in a short time. It is simply as to whether certain items go to maintenance and working, or whether they do not. That will make a small matter of it.

MR. FOOKS: Then we will go into oral evidence. Yesterday my learned friends and myself did not quite understand one another, now we do.

MR. MILLER said he proposed first to produce the Report of the Royal Commission made prior to the passing of the first Act of Parliament, in which plaintiffs said prospects were held out on which they were induced to enter into the contract. Was that objected to?

THE ATTORNEY-GENERAL objected.

HIS HONOR: They don't admit that the contract was entered into on that document, and it could have nothing to do with it. (Document rejected.)

MR. FOOKS: This was a report presented to Parliament, on which Parliament was supposed to have acted. It was a Government report—a Government paper.

HIS HONOR: Parliament cannot here be supposed to act on anything, and I have no evidence before me that it did so act. Indeed, from what I remember of occurrences at the time that report was rather ridiculed. I was the person who had the duty of introducing the Act, and I can tell you I did not rely on the Report of the Royal Commission.

MR. FOOKS said there was a disagreement as to the construction of the contract, and they were entitled to refer to all contemporaneous documents to remove any latent ambiguity. He did not say there was any evidence in the contract of latent ambiguity, but the point might be raised.

HIS HONOR: And if the point is raised we will then decide to admit the document if it is admissible; should it prove admissible I will allow it to be put in at once. It is not at this moment admissible.

MR. MILLER said the date of the Royal Commission's Report was 14th August, 1868. The next thing he desired to put in was the articles of association of the Tasmanian Main Line Railway Company, Limited, a copy of which was forwarded to the Government of Tasmania, and was in their possession, and included amongst the printed papers.

HIS HONOR: In what aspect is that put in?

MR. FOOKS: The contract was entered into with the Company, which was an incorporated company. They could not reject the memorandum of association, because the Company was incorporated under it. The Legislature had due notice of this Company's incorporation at the time the contract was authorised to be entered into. In fact, these articles proved the origination of the

Company, with the conditions on which it was formed, and all that constituted its legal status, and it was important in connection with the interpretation of the contract, with reference to the accounts, and with reference to the constitution of the Company and its nominal capital; and also, on that point which he raised yesterday, on the interpretation of that clause in the "Main Line Railway Act, No. 2," which used the extraordinary expression that the whole of the capital required for defraying the expenses of the undertaking must be deemed to have been subscribed. He confessed he was puzzled over that, to know whether it meant that the capital should be deemed to have been expended, or whether it had only reference to something deemed to have been subscribed. Of course what he now said was in anticipation of what the other side might advance. When he looked at the correspondence which had taken place the whole thing was accounted for.

His Honor: The only way in which I can understand the document to be admissible is this, that when the Government were contracting with the Company it had no power to raise extra capital.

Mr. Fooks: There was nothing said about extra capital, and a good reason why—

His Honor: Ah, that is not the point here.

Mr. Fooks was anxious to save time, and the two things were cognate matters, and would be valuable in the progress of the case. The memorandum and articles of association had come to the knowledge of the Government and of the Legislature, that was apparent. It was clear, in connection with the contract made with the Company, that this Company was to be known to the Legislature through its officers. And having the memorandum of agreement and articles of association, it might have been thought unnecessary to make any other stipulations than they did.

His Honor: What has the Legislature to do with it?

Mr. Miller: They have got the contract, that is the same thing.

His Honor: It must be proved that it was in the hands of the Government or the Legislature, and it may be admissible. I have no evidence to lead me to that. It may be hereafter put in evidence, but there is no evidence at present. As I understand the Act, it was in the power of the Government to contract with any Company, not only the Main Line Company.

Mr. Miller: It was in the knowledge of the parties contracting under the Act of Parliament. They would not go beyond the Act of Parliament.

His Honor: The Government might treat with any Company. When that Act was passed it showed what was to be done with reference to the contract. That contract was made with the Main Line Company, but how the articles of association of the Main Line Company could bear on the subject before they contracted, he could not see. On the other hand, he did not see why the other side should object. As to both documents, the Report of the Royal Commission showed the cost of the railway at £800,000, and the articles showed that it would be a million, and it showed the Company provided for that amount of capital.

Mr. Fooks: And it showed that those who were authorised to contract had knowledge of the Company's capital.

Dr. Madden thought in the aspect in which His Honor had put it the document might be admissible. It was tendered as the articles of association of the Company, and as showing that at the time the contract was in contemplation these Articles of Association were before Parliament, and that the Parliament contracted in view of the fact that under its constitution the Company had no power to increase its capital. The very fact referred to would be pressed by him in another way. What they wanted was to lead at once to the points of contention in the case, whereas his learned friend was raising matters away from the issue. Yesterday he referred to something that was not in the pleadings, and now he introduced other extraneous matter. He (Dr. Madden) wanted to choke that off at once, so that they could go to the proper issue at once.

His Honor: Under the Act the Legislature gave a general power to contract with any company. He did not see that at that time the Legislature could know anything of the contract. The Government had the power to contract as it liked.

Mr. Miller: It was put in to show what was before the Legislature.

Mr. Fooks desired to show that the Government, through its responsible officers, had formal knowledge of these articles of association, and that the capital of the Company was completely absorbed under the articles of association.

Dr. Madden: That is not true, and is not suggested.

His Honor: The question is not raised in the pleadings. As to this being a duly formed company, that was admitted. It was not necessary to put in the articles of association unless some ulterior object could be shown to him.

Mr. Miller: The contract and a letter written by the Premier, Sir James Milne Wilson, just before the contract showed—

His Honor: Sir James Milne Wilson had no more power than I had to subvert the contract. If he had promised to give a double meaning to any of the provisions it would make no difference now in the interpretation of the contract.

Mr. Miller: The object was to show that the contract was identical with the provisions of the Act. He should not attempt to put it in if it was in any way contrary to the Act.

His Honor: Is the objection still made?

The Attorney-General: Yes, Your Honor.

His Honor: Then I cannot admit the document. I will take a note of it.

Mr. Miller: The letter is dated 31st October, 1870. The contract was the next, and they

proposed to tender a letter from the Chairman of the Company covering the contract. He presumed that would not be objected to.

DR. MADDEN: Most decidedly.

HIS HONOR did not see what it had to do with the contract. They did not want to go outside the contract. He did not care what any one may have written or said. Let them keep to the contract; that was the real matter.

MR. FOOKS said it was important in relation to that clause in the Incorporation Act under which the Company was authorised to raise additional capital to the amount of £400,000, in shares of the Company; and it would explain what he had contended in reference to the Lands Clauses Consolidation Act, that the capital was to be deemed the paid-up capital of the Company.

HIS HONOR: But would what your own officers wrote on your own behalf be evidence?

MR. FOOKS: There is more than that. There is the reply of Sir J. M. Wilson to Mr. Sheward, Chairman of the Company, which states that the Company's capital had been subscribed to the amount of £650,000. That explained what the Company's capital was to be, and admitted it had been subscribed not for the purposes of the Lands Clauses Consolidation Act only, but absolutely.

HIS HONOR: Is it objected to?

DR. MADDEN: It is. They wanted to keep out all extraneous documents. They did not want to introduce documents of this kind, however harmless, or to encumber the case with matter irrelevant to the issue. They wanted to stop their introduction at once.

HIS HONOR: Well, this is a letter from one of the Company's own officers. I can't admit it.

MR. MILLER: The only question was whether the two letters, the one concerning the contract and making certain statements, and the recognition by the reply of those statements, did not show a contemporaneous knowledge. It was an admission of the fact that the capital had been subscribed.

HIS HONOR: And what has that to do with the issue?

MR. MILLER: Does your Honor not think it would be safer to introduce it, and for my learned friend to admit it?

The ATTORNEY-GENERAL: Yes, but this is not a letter from the other contracting party. He is Sir Charles Du Cane.

HIS HONOR: Oh! there is no difference—it is the Government.

MR MILLER thought it would be safer to admit it.

DR. MADDEN thought those letters might go in.

The letters were admitted accordingly—one dated 19th April, 1872, from Mr. Sheward to Sir J. M. Wilson, and the reply dated 13th June, 1872, from Sir J. M. Wilson to Mr. Sheward. The letters were read as follows:—

Tasmanian Main Line Railway Co., Limited,
4, *Great Winchester-street Buildings, London,* 19*th April,* 1872.

SIR,

I HAVE the honor to inform you that the Contract with the Tasmanian Government has been taken up by this Company, and was sealed with the common seal of the Company on the 15th ultimo, in the presence of a representative from the Crown Agents for the Colonies; also, that subscriptions have been invited from the public for £650,000 Bonds of the Company, the whole of which have been taken up; and further, that a Contract for the due execution of the work has been entered into with Messrs. Edwin Clark, Punchard, & Co., of London, who have sent out a staff by the present mail to organise the immediate commencement of the Railway.

Mr. Audley Coote also proceeds to the Colony by the present mail, authorised to represent the Company there.

Mr. Charles H. Grant, who has also started for the Colony, will be the Engineer of the Company in Tasmania.

I am requested to add that the Directors have every confidence that the Railway will be completed within the time allowed by the Contract, and to the satisfaction of the Colonial Government.

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

J. M. WILSON, *Esq., Colonial Secretary, Hobart Town, Tasmania.* GEORGE SHEWARD.

Tasmania,
Colonial Secretary's Office, 13*th June,* 1872.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of the 19th April last, acquainting me that the Contract with the Tasmanian Main Line Railway Company was sealed with the common seal of the Company on the 15th March; and that a Contract for the execution of the work has been entered into by the Company with Messrs. Edwin Clark, Punchard & Co.; and that the Company's capital has been readily subscribed to the full extent of Six hundred and fifty thousand Pounds.

I am happy to be able to congratulate the Company on the successful inauguration of this undertaking, in which the Government of Tasmania is so largely interested; and am glad to learn from you that the Directors entertain a confident expectation that the Railway will be completed within the time allowed by contract.

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

GEO. SHEWARD, *Esq., Chairman Tasmanian Main Line Railway Co. (Limited).* J. M. WILSON.

MR. MILLER said they next proposed to put in the case and opinion on which the Act authorising the release of interest was passed (42 Vict. No. 5.) That was an opinion obtained by the Tasmanian Government.

The ATTORNEY-GENERAL objected.

HIS HONOR thought this did not refer to the case at all. There was a compromise arrived at, but he did not see how that compromise could affect the issue in this case.

MR. FOOKS said they were not now dealing with the Disputes Settlement Act. This was an Act which authorised the payment of moneys out of the revenue of the Colony on an opinion which was obtained because, he understood, the Government thought the moneys were not payable. It was a matter of fact, and they should refer to the facts recited.

HIS HONOR did not see how it applied to this case.

MR. FOOKS said there was a probability of this case coming before another tribunal, and the question might arise, why was not so and so admitted? That was what he wanted to show, although, of course, he would bow to the opinion of the learned Judge. Another tribunal would want to know why such and such documents had not been admitted.

HIS HONOR: And therefore you ask for every possible thing, so as to be on the right side?

MR. FOOKS said yes, that was why he asked for all these things. The case might yet have to go before the Privy Council.

HIS HONOR: I sincerely hope it may. It will relieve my shoulders of a great responsibility.

MR. RITCHIE said this formed a portion of the correspondence which was forwarded by the Premier of the Colony to the Chairman of the Company. It formed a part of the general correspondence which was admissible in evidence in this case, and he believed that all the correspondence had been really admitted.

HIS HONOR: All that bears on the question at issue. It was not necessary that they should admit all the correspondence respecting the Main Line Railway. There were twelve or fourteen items which would come before the jury, and anything bearing on those would be admitted. He should reject this, and make a note of it.

MR. MILLER said the next document he wished to put in was the release executed in 1882. His object was to show the admission of the completion of the contract as to construction. That was raised by the issue.

HIS HONOR said that would be admitted.

DR. MADDEN said it referred to matters obviously before these disputes arose at all. That referred to what happened in 1882. The disputes did not arise until 1884.

HIS HONOR said what the Company said was that the disputes were recited.

DR. MADDEN said they would admit it.

MR. MILLER said the document was traversed by the pleas. They would also want the Auditor's certificate in connection with the release.

DR. MADDEN: You want us to admit that the line was constructed and opened for traffic along its whole length—we admit that.

MR. MILLER: There were certificates at the end of the four years of construction, but there was another and an important one; under your general traverse you deny it, and I want to put it in as proof, so I ask for the Auditor's certificate of the date of the release.

THE ATTORNEY-GENERAL: We should like to see it.

MR. MILLER: You have got it.

HIS HONOR: It must be here.

MR. MILLER to the Attorney-General: Well, you will be able to send and get it.

DR. MADDEN: If the general averment is admitted that the railway was opened for traffic in accordance with the contract, what more do you want?

HIS HONOR: We may take that as an admission.

THE ATTORNEY-GENERAL: We agree to that, and we have said so.

DR. MADDEN: What date?

MR. RITCHIE: It is on the 1st November, 1876, and that a sum of £650,000 at least was expended on the line.

DR. MADDEN: I admit that too—six hundred millions, if you like.

MR. MILLER said the next document was the quarterly abstracts of receipts and expenditure as rendered by the Company.

HIS HONOR: That is all admitted, but the documents should be in the hands of the Court.

THE ATTORNEY-GENERAL: We have sent for them.

MR. MILLER would now commence the case by calling the Accountant who prepared the abstracts.

HIS HONOR said the general abstracts had been delivered in due form, and gone through by the Colonial Auditor, as far as they represented moneys received and expended. The only question was as to whether the expenditure was legitimately incurred or not.

MR. MILLER: And it is important we should call witnesses to prove this in the ordinary way. I call Mr. Ellis.

ROBERT JOSEPH ELLIS, *examined by Mr.* BYRON MILLER.

1. What is your profession? An Accountant.

2. Do you hold any position in the Tasmanian Main Line Railway? Yes, Chief Accountant and Traffic Auditor.

3. Had you any experience of railway accounts, or of auditing them, before this? Yes; I was in the London and North-Western Railway Company's office for sixteen years, in the audit department and on the audit staff.

4. From the time of your arrival in the colony in 1876 up to the present time, have you been in charge of the accounts? Yes, in sole charge.

5. Is it part of your duty to prepare quarterly abstracts of the receipts and expenditure of the Main Line Railway Company? It is.

6. Is it part of your duty to forward those abstracts to the Colonial Treasurer? It is: I forward them through the Manager.

7. Within a time specified—within 14 days? Yes, they are forwarded exactly to date.

8. Do the abstracts as prepared by you represent—or, rather, what do they represent? They represent receipts and expenditure.

9. The whole of them? The whole of them, so far as they can be made up in the colony at the time.

10. Yes. Then, so far as they could be made up in the colony at the time, did they represent the total receipts and expenditure on every account? They did.

11. Did the abstracts represent more than ordinary traffic receipts and expenditure? Yes.

Mr. Miller here put in as an illustration of the abstracts, that dated 14th January, 1885, and read the items thus:—Permanent way; locomotive power; carriages and waggons; traffic expenses; general charges, London; general charges, Tasmania; miscellaneous expenses; Launceston and Western Railway tolls; and then a credit by balance from last quarter, bringing up a total of £17,709. That was the credit side of the account. Then on the debtor side they had:—By receipts generally; passengers; parcels; horses and carriage of dogs; excess luggage; left luggage; telegrams; mails; goods; live stock; rents and sundries—bringing up a total of £18,157.

12. *His Honor.*—Is there anything beyond traffic receipts included in the abstract?

Mr. Miller.—Yes, there is the mails.

His Honor.—But that is traffic.

Mr. Miller.—There are the rents, Your Honor.

Dr. Madden.—The rents of what?

Mr. Miller.—Of the men's huts; they are charged for. Then there are the telegrams.

His Honor.—And what is the amount of the rentals?

Mr. Miller.—Rents and sundries, £175 4*s.* 1*d.*

His Honor.—And the telegrams?

Mr. Miller.—£76 16*s.* 4*d.* Of course, I take up this account simply as an illustration to show the general nature of the abstracts.

Examination of witness continued by Mr. Miller.

13. *By Mr. Miller.*—When you came out to to take up your present position, did you make yourself acquainted with the several clauses of the contract? Yes.

14. In your previous experience before taking this position, had it formed a part of your duty to interpret contracts in reference to accounts? It had.

15. In rendering the abstracts of receipts and expenditure in the shape you did, had you any guide? Only the contract.

16. Under what clause of the contract do you get authority, in your opinion, to make out the abstracts of receipts and expenditure in the form you did?

Dr. Madden.—That is interpreting the contract.

Mr. Miller.—No; I ask the witness under what clause is it?

His Honor.—And that surely involves an opinion on the contract.

Dr. Madden.—That is what they really want, and it can't be admitted. We don't want his opinion.

Mr. Miller.—I merely ask under what clause it was done, that is all.

His Honor.—The question comes to the same thing. It is really asking, what is your opinion of the construction of the section?

Mr. Miller.—No, Your Honor; I don't propose to ask his opinion, but simply in reference to his act. Whether that act was right or wrong will depend on the interpretation of the contract by Your Honor. I will put it—under which clause of the contract did you prepare the accounts of receipts and expenditure?

His Honor.—Or, how did you prepare them? I presume there would be some advice.

Witness.—I consulted the General Manager, Mr. Grant, and it was by his advice in consultation that the abstracts were prepared in that particular way.

Examination continued by Mr. Miller.

17. Were those accounts, as rendered by you, examined in your office by anyone on behalf of the Government? They were, every half year.

18. To your knowledge? To my knowledge, and in my office.

19. In what way were the accounts so examined and tested? By an examination of the vouchers and the books of the Company.

20. By whom? First of all by Mr. R. M. Johnston, and subsequently by Mr. J. W. Israel, of the Audit Department.

21. *His Honor.*—Were they both from the Audit Department? No; Mr. Johnston was accountant of the Government Railways at the time, and was specially appointed for this duty.

22. Did you produce to these gentlemen vouchers of all payments as asked for by them? I did.

23. And was the fact of payment of any item on any side of these accounts ever questioned?

Dr. Madden.—That question is objectionable. The fact that an account has been examined is no test that it has been admitted. Nor would the fact of no objection having been raised be an admission of it.

Mr. Miller.—Except that it is a fact.

Dr. Madden.—I have to guard against the admission of matters of this sort now by objecting to the question.

Mr. Miller continues examination.

24. Were any of the accounts on either side questioned by any person during these examinations on the part of the Government?

His Honor.—I think the legitimate form of putting the question would be—What did you hear in reference to any of these accounts? Did you hear any objection made to any of the items?

25. *Mr. Miller.*—Well, during the examination of these accounts did you hear any objections? I don't recollect hearing of any.

26. You know the claim made in this suit, and the amount claimed? I do.

27. With the exception of a sum of £288 already paid within the last day or two, have any of the amounts been paid? No.

Dr. Madden.—Of course they have not been paid, or we should not be here.

28. *Cross-examined by Dr. Madden.*—You have spoken of the telegraph receipts mentioned in these accounts? I have.

29. Are these abstracts of receipts and expenditure prepared by you? They are.

30. You stated that in the quarterly abstracts of receipts and expenditure there are included charges with respect to telegraph operations? There are.

31. In the same quarterly abstracts do you charge charges for maintenance and repairs to the telegraph system? Yes.

32. And, in addition, I understand your Company receives from the Government a special subsidy of £100 a year towards the telegraph system? They did not at that time.

33. In 1883 or 1884 was this subsidy given by the Government? I could not be quite sure; but I think it commenced about the middle of the year 1885.

34. You are familiar with the items which are in dispute? That is in connection with the Government putting a third wire along the railway.

35. You are aware of the items which are the subject of dispute between the Government and the Company? Yes.

36. You know the items "O'Brien's Bridge" and "Bridgewater"? Yes.

37. Omit those two items from the account, you know the works to which the others refer? Yes.

38. All these items were either new works constructed on this railway that did not exist in 1882, or were new rolling stock which did not exist on the railway in 1882? Yes.

39. Take the items (1) Hobart—Erection and fitting up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop, £346 8*s.* 2*d.*; (2) Hobart—Building the covering and chimney stack for exchange locomotive shop, engine, and Cornish boiler, and preparing site for removal of brass furnace, &c., £721 13*s.* 5*d.*; (3) Hobart—Putting up porch in front of station to keep vehicles from front door, £91 13*s.* 11*d.*; (6) Gatekeepers' Lodges—Erection of 15 lodges, for which a rental of 3*s.* and 4*s.* per week each, according to size, is charged, £736 14*s.* 11*d.*; (7) 5 second-class carriages, 2 second-class excursion carriages (double bogie), 4 horse-boxes, 12 low-sided trucks, 1 travelling crane, £3827 18*s.* 8*d.*? These first four items relate to buildings which were erected and which did not exist in 1882.

40. And the last item—No. 7—related to works that did not exist in 1882? Yes.

41. There were, I believe, certain charges made for repairs and re-arrangement in additions to buildings that did exist before 1882? Yes.

42. The Government allowed them to pass? They made no objection to me at all.

43. You are aware that such things have not been objected to by the Government: for instance, suppose you bought a good engine to replace a bad one, it has been allowed by the Government, althoug it may be a more expensive one? Yes.

44. And so as to wagons? Yes.

45. And to rails, when it was necessary to replace them with a weightier or better class? Yes.

46. In a word, anything you had in the way of renewal of that which existed before has been allowed to you, even though it were more costly? Yes.

47. You are familiar with the fact that correspondence passed between the Government and your General Manager, Mr. Grant, in relation to these 1883 items? Yes.

48. In 1885 an investigation took place as to the quarterly abstracts of accounts by the Government officials in your office? Yes.

49. And at that investigation certain items were considered which were embodied in the items in dispute in 1884? I know no particulars.

50. Look at the document in your hand; is that made up by you? Yes.

51. Strike out the first item (Jericho). Do all the eight succeeding items represent works which were absolutely new, and did not exist in 1883? The last two numbers, 15 and 16, were 1883; they were part of the 15 new lodges in 1883.

52. As a matter of fact, these did not exist in 1883? No.

53. And all the rest were new rolling stock obtained during 1884? Yes.

54. And new, in the sense that they were absolute additions to the rolling stock, not substitutions? They were additions to what previously existed, of course.

55. In the year 1884 you also had rails to renew, and repairs to existing works? Yes.

56. That has all been allowed to you by the Government in their accounts? Yes.

57. All works in the nature of renewals were allowed? Yes.

58. And these items were for additional rolling stock? Yes.

59. *By Mr. Millar.*—Take the first item, "erection and fitting up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop,"—was that an entirely new work? The store was a new work, and the rest was an old work.

60. Was this store to replace the original store? Yes, the original store was taken away and a new one was built to take its place.

61. Was there any necessity for taking it away and replacing it? Yes.

62. From your own personal knowledge what necessity was there to remove that old store and replace it with a new one? My knowledge is based entirely upon the stationery department. From that knowledge it was necessary.

63. Why? Because it was open to the smithy and the blacksmiths' shop, and was totally unfit for stationery.

64. You are aware, as to the residue of the items, that they were not new—"the erection and fitting up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop?" Yes.

65. There had been a carpenters' shop there before? Yes.

66. Did the traffic on the railway increase since the opening, when the original carpenters' shop existed? Yes.

67. Do you know whether, up to the time when this alteration was made, there was any increase, and, if so, what increase in the traffic? There was a very large increase in the traffic. I could not say from memory exactly what it was.

68. Do you know of your own knowledge whether the increase of the traffic rendered these alterations necessary?

His Honor.—You are asking a question that an accountant cannot reply to. There could not be a worse witness.

Mr. Miller.—My learned friend commenced by making an impression upon the witness.

69. *Re-examined by Dr. Madden.*—What was the building which had previously been the carpenters' shop? It was a building about the size of this (the Court) room.

70. I believe there was no place for the deposit of the stationery except that room? Yes; it was in a smaller room between that and the smithy.

71. What sort of room was that? It was all in the one building, except that it was divided into three parts.

72. It was divided into a carpenters' shop, general store, and smithy? Yes.

73. There was no separate stationery store—it was a general store? Yes.

74. When this work was executed was that building pulled down? No.

75. What became of it? It was altered; the fittings were taken down.

76. As a matter of fact, then, the buildings were totally separate? Yes.

77. Where was the building erected? In an enclosure—a separate part of the domain.

78. What was the size of it? Perhaps not quite so large as this (the Court) room.

79. How far was it from the one which previously existed? About 100 yards, roughly speaking.

WILLIAM CUNDY *called in and examined by Mr.* RITCHIE.

1. What is your name? William Cundy.

2. You are in the service of the Main Line Railway Company? Yes.

3. In what capacity? I am Locomotive Superintendent.

4. How long have you been in that position? 11 years.

5. What appointment did you hold before you joined the Main Line Railway Company? Inspecting Engineer for the Victorian Government Railway Department.

6. What is your profession? Mechanical engineer.

7. Is it part of your duty to see to the rolling stock? Yes.

8. Do you remember the store mentioned in item No. 1? Yes.

9. Did you superintend that? I did not superintend the building of it.

10. Who took over the old store? I did.

11. Will you tell us what was done at the time it was taken over? The old store had the necessary fittings, and the whole of these fittings were taken out and replaced in the new one, as far as they went.

12. Where was that new store built? The old store was next to the smithy, and a door led from the smithy into it. This store contained oil, kerosene, cotton waste, and stationery—in fact, inflammable material—and I considered it unsafe. A spark might easily have ignited the cotton waste and destroyed the whole building. That was the reason why I considered the alteration necessary.

13. Did you superintend the second item, "building the covering and chimney stack for exchange locomotive shop, engine and Cornish boiler, and preparing site for renewal of brass furnace? Yes.

14. Was that necessary or not? It was necessary, because the semi-portable engine first imported by the Company was considerably worn out, and was too small for the work, and necessarily very expensive in fuel.

15. What state was the old engine in? It was, practically speaking, worn out.

16. Was the new engine a more powerful one? Yes, it was more powerful, and was obtained under very advantageous circumstances.

17. Did you arrange to get it? Yes.

18. Did you sell the old one? Yes.

19. What was the difference between the sale of the old one and the purchase of the new one—was it a gain or a loss? For the engine itself it was a gain; for the engine and boiler combined there was a trifle more.

20. It was a very favourable arrangement for the Company? Yes.

21. You say that the rolling stock was under your charge? Yes.

22. There is an item in this account to which I will call your attention: "Five second-class carriages, 2 second-class excursion carriages, 4 horse-boxes, 12 low-sided trucks, 1 travelling crane"—do you remember these? Yes.

23. Was all that rolling stock constructed here? No; the travelling crane and two carriages were constructed here.

24. And did you superintend the construction of these? Yes.
25. By whose advice were these carriages, engines, and trucks constructed? By mine.
26. Why did you consider it necessary to have these constructed? Because the old carriages were rotten and not fit to run. They were kept for short journeys.
27. These carriages were necessary to replace the old ones? Yes.
28. How were they reduced to this state? Either in consequence of their being constructed of bad material or from old age, or both combined.
29. At that time was the rolling stock sufficient for the line? Not for the increased traffic.
30. You have been eleven years on the line? Yes.
31. Were these new carriages necessary to carry on the traffic of the line? Yes.
32. Could the traffic have been carried on effectively and efficiently without them? No, certainly not.
33. Now take No. 9—two new engines, Nos. 15 and 16—when were they got? I do not remember the year.
34. When they were got, were they necessary for the efficient working of the line? Yes.
35. How much were the old engines sold for? One was sold for £1200, and the other for £600.
36. Were they fair prices in their then state? Yes.
37. How much did they cost? I only know from what I was told; namely, that they cost originally about £4000 each.
38. Are there more or less engines running at the present time than in 1884? Two more.

Cross-examined by Dr. Madden.

39. Do I understand you to say that this rolling stock to which my learned friend has referred, and which is referred to in this document, is new rolling stock, in addition to what existed before? It is new stock.
40. How many engines had you before you got these new ones? Eleven.
41. How did you number them? From 1 to 11.
42. If you got a new engine in substitution of an old one, how would you number that? If the old one was destroyed we would number the new one in its place.
43. You would give it the old number? Yes.
44. If No. 2 were blown up, you would number 2 again? Yes.
45. Suppose you had new ones in stock, you would number the new one 12? Yes.
46. You are acquainted with the items in dispute? Yes.
47. All the items are numbered with numbers higher than those in stock before? If a carriage is broken we make a new one and give it the old number.
48. You are the man who supervises the marking or remarking of stock? Yes.
49. Has any of the stock a higher number than those you had to mark in 1883?—there are two new numbers, are there not? They are not exactly two new ones. One or two carriages have been broken. I could not say.
50. I find in a document that three new locomotives have been placed on the railway; one of these is in substitution of that sold in 1883.

Mr. Miller.—Does my friend propose to put the document in as evidence?

Dr. Madden.—Certainly, I will put it in later on. (To Witness)—This letter (11—27th April, 1875) is in answer to a question from us, and says that although there were three new locomotives one was in substitution for one sold in 1883, and was therefore not included in the return because it was in substitution for a new one. Do you agree with that? Yes.
51. There have been several substitutions, as I told you before. Mr. Grant has written us a letter in which he refers to these two returns. We have asked him whether any of the engines and rolling stock mentioned in these returns are in substitution for old stock. He said of the three locomotives one was in substitution of that sold in 1883, and is not therefore included in the return. Do you agree with that? Yes, I admit that.
52. And two covered trucks, he goes on to say, having been made to replace missing numbers which had been destroyed in an accident, are also not included. Do you admit that all the rest of the stock is absolutely new? I cannot swear that.
53. You remember the erection and fitting up internally of store in Hobart yard, and alteration of original store? Yes, I remember that.
54. Do you agree with Mr. Ellis that the new building is absolutely a different work? Yes, the old one is of stone.
55. They are 100 yards apart, and the new one is absolutely new? Yes.
56. Did I understand you to say that some old shelving was taken out of the old building and put into the new one? Yes.
57. Before the furniture was moved into the place, the only portion of the building which had been in existence before were some planks or shelves? Yes.
58. By far the greater portion of the building was new? A very small portion of the shelving was new.
59. How much shelving was there altogether? I could not say from memory.
60. Was there 300 feet of it? Yes.
61. Was it ordinary pine? Yes.
62. 12 inches wide? Yes.
63. Whatever it was, it was not charged for, because it was there already? Yes.
64. Because of that they were not charged for? No, only for the labour of moving them.
65. Now look at the second item,—Building the covering and chimney stack for exchange locomotive shop, engine, and Cornish boiler, and preparing site for removal of brass furnace—you had an old partly portable engine? Yes.
66 It was a comparatively small engine? Yes.
67. Had it any covering at all? Yes, it was in the stone building, part of the main building.

68. You bought an entirely new engine in substitution? Yes, we bought a second new one, more suitable for the work—a more powerful one.

69. Are you aware that the Government allowed you to charge that? I do not know.

70. The old engine was removed altogether? Yes.

71. A new engine was erected, a chimney stack was built for that engine, and a new building was also erected? Yes.

72. Do you know of any etceteras in connection with the building? I believe there was a water tank put up that was quite new? No, it was partly made up.

73. As a matter of fact, a new water tank was constructed out of the old materials? Yes, out of worse materials.

74. The erection of the house over the engine was new? Yes.

75. The chimney stack was built over the engine? Yes.

76. "Preparing site for removal of brass furnace." The old engine was there; the new engine was put on another site? Yes.

77. And in order to be quite sure the locomotive shop was built for the Cornish boiler as well as for the engine? No, the engine-house was built for that.

78. And the site was a new one? Yes.

Re-examined by Mr. Ritchie.

79. Of what materials was the foundation built? Of concrete and brick.

80. New ones? No; second-hand bricks, from beginning to end.

81. Could you classify your goods in the old store? No. The erection of a new store enabled our storekeeper to purchase large quantities of stock at advantageous rates.

82. Could you classify and protect them in the old store? No, not in quantities to keep us going.

83. You said there was no charge for the old things that were used in the new store? There would necessarily be a charge made for the new materials, but not for the old.

84. About how much was the cost of the new, and about how much was the value of the old? I could not tell you unless I measured it.

85. Did the price of the new exceed the value of the old? No.

86. What was the shelving made of? Hardwood.

87. Were not packing cases used? Yes, for making shelving, with hardwood uprights.

88. Was that new store put up in the most economical way? Yes, it was.

89. Was that old engine powerful enough to do the work required to be done? No, it was necessary to get a more powerful one.

90. Could you have done without erecting a new engine house? No, certainly not; it was absolutely necessary.

91. Was it a saving or a loss to the company, erecting this engine house? It was a saving to the company in fuel and wages; it required less attention.

92. The returns show that in 1885 there were 16 engines, in 1886 there were 15, and in 1887 there were 14. How can you account for that?

Dr. Madden asked if they were concerned with what they had now?

His Honor.—That return would not be used now. (To witness.)—What is about the natural life of an engine on that line? The natural life of a locomotive boiler at original pressure is eight years. You must reduce the pressure every year after that.

His Honor.—What is the natural life of a carriage? It depends upon the make; the original stock first imported are done now.

His Honor.—Their life is not more than ten years, then? No.

His Honor.—And the new carriages? They would last about 15 or 20 years.

CHARLES CAMERON NAIRN, *Resident Engineer Main Line Railway, called in and examined.*

1. *By Mr. Miller.*—What is your name? Charles Cameron Nairn.

2. What position do you hold? I am Resident Engineer of the Main Line Railway.

3. For what time? Since its construction, about 16 or 17 years.

4. Are you aware of the growth and expansion of the traffic? Yes, perfectly well.

5. Since the opening of that line for construction down to the end of 1884, was there any great growth or expansion of the traffic? Considerable growth.

6. Was the train service increased? Very considerably.

7. Was that increase rendered necessary to meet the exigencies of increased traffic? Yes.

8. Was the increased traffic for goods as well as for passengers? Yes.

9. This is a narrow gauge, with difficult curves? Yes.

10. Would the necessity for repairs and replacements be greater on such a line than on a broad gauge line? Yes, I think so.

Dr. Madden.—That is not at issue.

Mr. Miller.—I think it is at issue. We contend that what you consider rolling stock are temporary replacements.

Dr. Madden.—My learned friend Mr. Fookes opened the case largely and elastically, and we can only gather what the issue is between the parties. I think it might well be admitted that there is no issue, as the substitution of rolling stock and repairs of this class were allowed for by us.

11. Would the increase in the traffic require the substitution of an increased strength of rail? Undoubtedly.

His Honor.—It is admitted as to that—why put the question?

Mr. Miller continued.—Would the increased traffic of goods on such a line—

The form in which the question was being put objected to.

12. *Mr. Miller continued.*—What would be the effect in shortening or lengthening the life of engines on a narrow-gauge line of the increase of traffic? I don't understand the question.

13. What is the life of a railway engine or carriage? I don't know. It is not in my department.

14. Could the line have been worked with much increase of traffic with the original railway stock? No, certainly not.

15. In working that line could you or could you not have allowed an engine to expire, as it were, without getting a new engine to replace it? Certainly not.

16. Could you with an increase of traffic—could you have been content to keep in stock the same number of engines with which the line was opened?

Dr. Madden.—That is asking for an opinion on railway policy.

His Honor thought it could hardly be put in that way—"could you be content."

Mr. Miller continued.—Well, was it necessary or unnecessary to have a larger number of engines in hand—in stock—in consequence of the increase of traffic? Undoubtedly. Where there is an increase in traffic there must be increased stock.

17. Now, take in your hand the items of expenditure objected to by the Government—you know them? Yes.

18. Do you know the first item—"Erection and fitting up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop?" Yes. I superintended that personally.

19. Was the expense of fitting up that shop considered necessary? Yes, decidedly necessary.

20. Why? The stores were being destroyed by the smoke from the engine chimney, and it was not considered safe on account of the risk of fire.

21. Was it a new erection, or so far new, and was that which was alteration rendered necessary by the exigencies of increased traffic? Undoubtedly.

Dr. Madden.—We don't suggest that the company would go and build a large store as a child would build a mud pie. No doubt it was considered very desirable and necessary.

Mr. Miller.—Very well.

Dr. Madden.—We think it unnecessary you should take up time with this evidence.

Mr. Miller.—Yes; we consider the evidence very necessary for our argument. If you admit it was necessary for maintenance under the sixth and sixteenth clauses of the contract, then it will not be necessary to take the evidence.

Dr. Madden.—I have no objection to admit that it was deemed by the company to be necessary.

Mr. Miller.—That won't do.

Dr. Madden.—That these works were, in fact, reasonable and necessary for the traffic. We admit that the works were reasonable and necessary, and that they were rendered so by the increase of the traffic.

Mr. Miller.—And to maintain the line.

Dr. Madden.—No. We admit that the Directors decided they were necessary, and that they acted on reasonable grounds, honestly entertained by them, as to the necessity.

Mr. Fooks.—That is not enough.

Mr. Ritchie.—Will you extend it to an admission of maintenance under Clauses 6 and 16?

Dr. Madden.—No, I will only extend it to the action taken on the part of the Directors, and that they considered it necessary.

Examination of Witness continued by Mr. Miller.

22. You have seen the contract? I have.

23. I ask whether all the items now under consideration and the new rolling stock—whether these were all necessary to enable the Company to continue the maintenance and working of the railway.

Dr. Madden.—I object to this, because it is an opinion. You can get the fact that they were necessary and supplied within the terms of a particular section, but the reason is a different question.

His Honor.—It is a leading question, to which Yes or No can be given. He has stated they were necessary, and can tell you the reason why.

Examination continued by Mr. Miller.

24. You were aware of the Contract and the clauses of the Contract? I was.

25. Why were the expenditures on the various items necessary? To carry out and provide for increased traffic on the line in a satisfactory manner.

26. In what way to carry on increased traffic—as to station accommodation, for instance? In consequence of the increased number of passengers travelling it rendered additional station accommodation necessary.

27. What rendered increased rolling stock necessary?

His Honor.—That has already been sworn to. It was on account of increased traffic.

Mr. Miller would not press those questions, but that his learned friend had withdrawn his admissions.

Dr. Madden.—Had not Mr. Miller put it that these works were necessary he would suppose that population and traffic increased rapidly, and he would admit it was all done for the accommodation of the increased traffic.

His Honor.—We have got from him that the line could not be worked with the original engines, station accommodation, and so on. We can now get what was absolutely necessary.

Mr. Miller.—Then we go to items such as this—ornamentation, for instance. Did the porch at the Station at Hobart become absolutely necessary?

His Honor.—Then put it, Has there been any unnecessary work? (To witness)—Was there any ornamentation in the works referred to? (Witness)—None whatever.

His Honor.—All done with the most beautiful simplicity? (Witness): Yes.

Examination continued by Mr. Miller.

28. Now as to the porch at the Hobart Station—why was that necessary? To prevent danger to passengers coming to the station, and danger to vehicles. It was not an ornamental structure.

29. It was for the public safety? Undoubtedly.

30. Was that a necessity of increased traffic? Undoubtedly. The increasing traffic rendered it more important.

31. Now the erection of fifteen gatekeepers' lodges—Was the erection of these due to increased traffic on the line—the necessity for them? Not so much by increased traffic on the line, but it was at the time difficult to get labour. We could not have got the men to stop unless the huts had been put up.

32. What was the original trainage? Three trains daily each way.

33. How many trains were afterwards running—say at the date of the last item, 1884? I should think about twenty.

34. Was the necessity any greater then to have the gatekeepers housed in the immediate neighbourhood of their labours. Was that necessity greater than at the time of the construction of the line? Yes. At the time of the construction of the line they lived there in temporary huts, but there were plenty of men available; but labour became scarce, and to keep them it became necessary to give them huts.

His Honor.—At first, I understand, they had tents and huts, and it became a necessity to put them into more substantial houses? Yes; in some instances they lived in tents and bark huts, but they were not content, and wanted a better class of building. Then these huts were put up for them.

35. *By Mr. Miller.*—Has the number of these huts been increased since the opening of the line? Of course they have been increased. In some instances the Company has been compelled to put up new huts in consequence of new roads having been opened up.

36. Then, some were in consequence of new roads and crossings over the line? Yes.

37. Then, with the increased number of trains, increased security for the public safety was necessary, and in view of the shortness of labour these were required for the gatekeepers? It was an essential, especially applicable to night trains.

38. Then, did the erection of these permanent residences for the men tend to increase the public safety? Undoubtedly: it enabled us to keep our best men.

His Honor.—But you could have done that by paying higher wages.

Mr. Miller.—You could not; you must have the accommodation.

39. Then, generally, your answer applies to all the gatekeepers' huts? It does.

40. Now, as an item of expenditure, has the erection of these huts cost the line anything—do the men pay rent for them? Yes, for every one rent is charged.

41. Do you know what per-centage is paid on the cost of erection? From 15 up to 25 per cent.

42. Then, in five or six years they will pay off their own cost? They will.

Cross-examined by Dr. Madden.

43. How long have you been on the line? Sixteen or seventeen years.

44. You were never on a railway before? No.

45. Your experience is confined to this line only? Yes; actual working.

46. Referring now to the rough huts these gatekeepers live in, I think they formerly erected bark huts and tents for themselves, did they not? The navvies did, of course.

47. I mean their huts and tents, good enough to keep the weather out, of course—were they not erected at their own cost? No; not in all cases, some of them were built by the contractors.

48. Were the men who were on the line when it was taken over living in bark huts built by themselves or left by the contractors, who did not charge the Company for them? I cannot say.

49. What is your opinion? I do not know.

50. Do you suggest there is the smallest foundation for supposing that the Railway Company ever paid for those bark huts? I have no knowledge at all in the slightest.

51. As a matter of fact, then, the tents and bark huts are now replaced by well-built lodges along the line? Yes; and they are very inexpensive.

52. Oh, no doubt, as contrasted with Government House; but they are well built of their kind? Yes, fairly well built.

53. Did you increase the number of the lodges at all? Yes; there are two or three more.

54. You charge rent for them? Yes.

55. Then I may take it that there was really no work, no old erection belonging to the Company in substitution for which these huts were erected? Oh, yes.

56. Where? "Rosetta Cottage," which was destroyed by a fire.

57. Do you not know that they were allowed for that? No, not for that. It is not mentioned. What they were allowed for was the cottage at Bridgewater.

58. Then where is "Rosetta Cottage?" About six miles from Hobart.

59. When was the original one built by the Company? It was built by the contractors.

60. When? I cannot give the date; it was some years back.

61. Was it in the year 1883 or 1884, or before? It was before 1883.

62. How was it, if that was so, that the Bridgewater erection was to renew an old building burnt down, that the other was not stated in the account? It was not questioned.

63. How was it that information was not given to the Government? It may have been burnt down since 1883.

64. Then, how is it you swear that it was before? I do not swear positively.

65. Do you think now it was burnt down before 1883? I do not swear anything of the kind.

66. Then you do not swear that any gatekeeper's hut was burnt down at "Rosetta Cottage" before 1883?

Mr. Miller.—You mean you do not swear positively? Witness.—I do not. On reflection, I think it was since 1884. It may have been in 1886.

67. You were asked if the gatekeepers' huts generally were built by the contractors. You said they were not. You were asked if the Company ever paid a farthing to the contractors for it. Have you any knowledge as to who paid all the cost of the erection of these huts? Which huts do you allude to?

68. Take those erected by the contractors? The Company paid for every one of the fifteen.

69. Do you know as a fact if the Company paid for any of the original erections? I do not know anything about it.

70. After the completion of the railway, had the contractors anything whatever to do with the line? Certainly not.

71. As a fact, was the line as completed and opened for traffic, completed by the contractors or by the Company? By the Company. It was taken out of the contractors' hands because they did not carry out their contract.

72. Then, whatever was on the line at the time it was taken out of the contractors' hands, the Company took over? Yes, everything.

73. But the number of huts you do not know? I do not know. There were some, and there are some of them in existence now.

The Court adjourned till 2·15.

Afternoon Sitting.

The Court met at 2·15.

Mr. Miller said it was now proposed to put in and read the evidence taken on Commission in Melbourne. He would put in the evidence of Mr. Zeal, and ask the Associate to read it.

Evidence read as follows:—

WILLIAM AUSTIN ZEAL *called and examined by Mr.* Hood; *sworn by Mr.* Dickson.

Q. What is your name? A. William Austin Zeal.

Q. What are you? A. I am a Railway and Civil Engineer.

Q. What experience have you had? A. Since 1845.

Q. Have you had any practical experience in constructing railways? A. Yes, at Home in the old country, and a large experience in the colonies.

Q. Have you seen the papers in this action? A. Some of them. I have seen the Acts of Parliament. I have seen none of the detailed papers.

Q. Have you seen the Contract? A. I saw the Contract and the published correspondence.

Q. Have you seen the items objected to? A. If they are comprised in what is published in the papers, I have seen them.

Q. There is an item charged to the plaintiffs here of "Erection and fitting up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop"; have you considered that item? A. Yes.

Q. In your opinion in the construction of railways ought such an item be constructed out of revenue or capital account?

Dr. Madden objected.

Witness—How I should make it out would be revenue.

Mr. Hood.—"Building the covering and chimney stack for exchange locomotive shop, engine, and Cornish boiler, and preparing site for removal of brass furnace, &c." Have you considered that item? A. Yes.

Q. In your opinion? A. It is fairly chargeable to revenue.

Q. Next item is "Putting up porch in front of station to keep vehicles from front door." Have you considered that item? A. Yes.

Q. In your opinion it ought to be paid out of revenue? A. Out of revenue. It is merely building work as originally designed.

Q. "Addition to Stationmaster's quarters, and repairing and repainting whole of station, &c." What do you say about that? Out of revenue? A. Yes.

Q. "Gatekeeper's lodges.—Erection of 15 lodges for which a rental of 3*s.* and 4*s.* per week each, according to size, is charged." What do you say about that? A. That is a portion of the works of the line, which is usually made after the line is opened for traffic. It has been always so in Victoria.

Q. Out of revenue? A. Out of working expenses of the line.

Q. "Carriages and waggons,—5 second-class carriages, 2 second-class excursion carriages (double-bogie), 4 horse-boxes, 12 low-sided trucks, 1 travelling crane,"—what do you say about that? A. Fairly chargeable to rolling stock.

Q. New cart road at Jericho siding? Yes; that is a development of the works of the railway.

Q. Out of revenue or capital? A. Out of revenue.

Q. "Two new engines, Nos. 15 and 16." Out of revenue or capital? A. Out of revenue.

Q. "Five new second-class carriages, three new horse-boxes, ten low-sided trucks, five new cattle trucks, six new platform trucks,"—what about that? A. Out of revenue.

Q. As to these extra items,—supposing the railway traffic is increasing, are extra carriages, waggons, horse-boxes, trucks, and engines necessary things? A. Absolutely necessary; the railway could not be worked without them.

Q. And are they necessary for the convenience of the travelling public? A. Yes.

Q. Fitting up of further stores and porch, and erecting the chimney stack for the locomotive shop, and parts of the front of the station,—are they necessary for the working of the railway? A. Yes, as the traffic increases the works must be enlarged.

Q. The additions to station-master's quarters, and painting gate-keepers' lodges,—are they necessary things for the working of the railway? A. Yes.

Q. Do you know anything about the increase of traffic, whether it has increased or not? A. In accordance with the—

Q. Do you know of your own knowledge? A. I visit Tasmania every year, and have seen the increase.

Q. You know of your own knowledge? A. I know that the traffic must have more than doubled since I was over there first.

The whole of the above evidence was objected to by Dr. Madden.

Cross-examined by Dr. Madden.

Q. How do you know? A. By looking on; that is a very good test.

Q. As I understand, you have paid a yearly holiday trip to Tasmania? A. Yes.

Q. On these occasions, as compared with your last year's trip, you have seen more people on the line? A. Yes, more travellers, more trucks, &c.

Q. From that, in your opinion, you are able to say definitely that the traffic has increased? A. Yes; I have no doubt whatever.

Q. Do you know that you said just now that the additional rolling stock is payable out of revenue. Do you know if the stock in question is absolutely new rolling stock? A. Some is new.

Q. All these matters referred to are new—trucks, &c.: are these payable out of revenue? A. Yes.

Q. They are additional, not the original things being repaired, but spick and span new rolling stock,—payable out of revenue? A. Decidedly.

Q. Do I understand you to say that anything that is done towards building and erecting the original line is payable out of revenue? A. Such works as were instanced, putting a porch over a station, making additional cutting, &c.

Q. Very good. Supposing the railway is half finished in the first instance. I understand because it was originally designed to be concluded to another point which is not yet reached, the finishing of that railway will be payable out of revenue? A. Yes.

Q. You swear that? A. Yes.

Q. Then I understand you also to say that the addition of any building along the line of railway will be payable out of revenue—the extension of any building will be payable out of revenue? A. If a certain amount of traffic is to be carried at the opening of the line, as the country gets settled and the traffic developes, it is a necessary consequence that these works must be increased and added to. It is merely maintenance, it is not the altering of the character of the line, but some of the details.

Q. Then, as I understand you, the completion of a railway which is only half made to begin with is one of the details to be paid for out of revenue? A. Not so far as that. The work that has to be finished must be finished in accordance with the Regulations of the Board of Trade. It must comply with the Regulations of the Board of Trade or equivalent Colonial regulations.

Q. What Board of Trade? A. It must comply with the Act of Parliament so far as the separate Colonies here are concerned, so that practically it is finished when the line is opened, with a few minor exceptions, which exceptions must be altered as the character of the traffic is developed.

Q. Then, if I understand you, when the Governor makes a speech and the railway is opened, any other building now which is erected is payable out of revenue? A. I would not go so far as that.

Q. If you would not go so far as that, what do you mean by your previous answer? A. Supposing a company starts and puts up a small portion of a station. That station will do for the requirements of a traffic of 20 thousand people. As the population increases that town may increase to 30 thousand inhabitants, and that station must be enlarged step by step with the increase of the population, and the rolling stock must also be added to from time to time.

Q. Now, for the last 20 years or thereabouts we have done very well with the Spencer-street Station, but we are told a Central Railway Station is to be made. That will be payable out of revenue? A. No, because the design is entirely altered. When that Spencer-street Station was built there was no plan contemplated for the proposed new station; now, there being a most expensive viaduct to be built along Flinders-street, it necessitates the erection of a larger station and the pulling down of the old one, and the substitution of another one in its place.

Q. Then, once a given railway line is opened, nothing upon that line in addition is to be payable out of revenue? A. A reasonable addition.

Q. A reasonable addition? A. It must be added to or enlarged as the traffic developes.

Q. Take the case where originally there was only a small station. In consequence of the development of the population in the locality a grand station is requisite. What about that? A. A commodious station.

Q. A large and expensive station? A. No, a commodious station.

Q. Say a large and expensive station has to be erected? There is nothing like that to be erected in Tasmania.

Q. Now you will take my instance, please. A large and expensive station would not be payable out of revenue? A. No.

Q. Then I understand the question is altogether a matter of bigness? A. The question is what is necessary for the working of the traffic. I would not go beyond that. No elaboration whatsoever, no ornamental works, nothing but plain, useful, necessary work.

Q. Suppose the line was opened as a single line of rails, and by increase of traffic and population it was thought desirable to turn the railway into a double line. A. That would not come out of revenue, because it is altering the design, making a double line in place of a single line—driving two horses in a carriage instead of one horse—a different state of things.

Q. Have you seen the new buildings? A. Yes.

Q. Do you know what the original design was of this station to which the porch has been added? A. I remember that station ever since the line has been open, and nothing material has been done to it.

Q. Then you justify that porch on the ground that it was part of the original design. A. I cannot say that.

Q. At all events, you don't know that you would say if that porch was part of the original design? A. No, it is a verandah to protect the passengers from the inclemency of the weather.

Q. Supposing that in the original design there had been no porch at all, and that the Company chose to erect a porch more or less magnificent, would you say that this matter would not come out of capital account? A. No, it would not come out of capital account. I would not have any magnificent work.

Dr. Madden would now submit an important consideration as to the evidence in this case, and the legal points involved in the whole question. He maintained they could not have expert evidence to say what was maintenance, capital, or working charges. These were terms of common import in our common language, and were for the interpretation of the Court. The contract itself showed precisely what they had to consider. First of all, there was the point as brought out by Mr. Fooks in his opening yesterday. The contract provided the whole guarantee from the commencement of the work—he meant the whole line of Railway. There the Governor, on behalf of the Colony, specially guaranteed to the Comanpy interest at the rate of five per cent. per annum up to 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." Now, it appeared from the evidence that the line was opened for traffic in November, 1876. That was the starting point. Afterwards the argument would pass to that "undertaking" on which his learned friend laid such stress—the fact of the opening of the line, and the maintenance and working of the line therefore was that "undertaking." It did not matter what the extensions of the line might be, they would be ordinary capital charges—something new and additional to what was constructed on the 1st November, 1876. He submitted that the railway opened in 1876 was the "undertaking" as far as construction went. Therefore, what was to be done was shown in Section 14 of the contract, which said—"If in any quarter during the said period of thirty years the profits of the said undertaking shall not reach an amount equivalent to five 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 five per cent., shall again arise or revive." There was the sweeping clause as to the reduction of profits. If the profits were over six per cent. in any period,—say seven per cent. or more,—then the Government divided such profits. If the Company made such profits as would render payment of interest unnecessary, then none would be paid, but if the profits did not reach an amount equivalent to the interest, then that would revive again, and so on from time to time during the whole period of thirty 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 sum of £650,000) either from the profits of the undertaking, or from the Governor." That plainly meant that the Government were to be bound at all times to pay a subsidy not exceeding in the whole £32,500.

Mr. Fooks said Dr. Madden had risen to object to this particular evidence. He had no objection to that, but thought the proceeding, in point of practice, somewhat irregular. He thought the evidence should be read, and objection might be taken to any question which was considered improper, or which should not be put, but he could not foreshadow objections to the general evidence. His learned friend thought evidence should not be given bearing on the contract, and to a certain extent he was at one with him. He thought it was self-interpreting, and had said so. It could only be interpreted in one way. He only agreed——

His Honor thought the argument fair. Dr. Madden argued that they could not take expert evidence on these points, and he had a right to argue it now. He could not hear Mr. Fooks now. Dr. Madden was protesting against the Commission, because he said they could not have the evidence of experts on the interpretation of the contract.

Mr. Fooks.—No; as to whether certain items should be charged to capital or revenue.

His Honor.—I must hear him, Mr. Fooks.

Dr. Madden would confine himself to the proposition, and wanted to point out that in the contract there was no technical expression—no word of art that needed expert evidence to interpret it. There was nothing to show that there was one word in the contract that was not of everyday acceptation.

His Honor.—May there not be words which would have a special meaning to those skilled in railway matters?—I mean words having a meaning peculiar to themselves. We all know that maintenance means to keep up the work in the condition in which it was in its primary stage, but might there not be some special meaning as to what maintaining and working included? He could see that it might embrace a great number of matters that might be clear to experts, but not to them.

Dr. Madden said that was the view with which that evidence was brought forward, but if there were such a meaning it should have been raised on the pleadings as a usage. It would have to be shown that there was a usage which controlled their view in the interpretation of the contract.

His Honor said they could not have evidence as to usage. The only question would be as to whether these words had a universally accepted interpretation, or whether they might not have some special interpretation here?

Dr. Madden said they could not have the usage, as what might be usage in one place would not be so in another. They must therefore interpret the words *lex non locum frustra*. If they wished to say we want to use the words "maintenance" and "working" in the sense in which they would be understood in France or Germany they should have stated so, and it was not suggested in the pleadings that there could be any such usage different from what was generally known here. They were to interpret the laws of this country in accordance with the views prevailing in this country.

His Honor said it was not proved to him that the words could have any other than their *prima facie* meaning. They could take nothing else than their ordinary meaning in that case. What would have to be done was to construe the meaning of the words in the terms of ordinary language.

Dr. Madden said if they went further he had come prepared with a mass of evidence to meet them if admissible; at present he held that it was not admissible.

His Honor thought expert evidence had little to do with it. The question was, what did the terms

capital, maintenance, and working mean in the ordinary acceptation of the terms? He thought the evidence now being put in as to capital account was immaterial.

Mr. Fooks would not depart in the smallest detail from what he had previously said. He did not require expert evidence at all; the common sense of the judge and jury would be quite enough.

His Honor then understood that neither side required expert evidence.

Mr. Fooks had not seen from the first that expert evidence was necessary, nor that there was room for it, but this was taken on the advice of his learned friends, who thought it might be in anticipation of something that the pleadings might admit. If they did admit of expert evidence he wanted it in the way of rebutting evidence, and not as evidence in chief.

Dr. Madden thought up to a certain point he was at one with his learned friend, but he was certainly at two with him as to rebutting evidence; he would not admit that point at all. They did not want to jockey one another out of evidence, therefore he would point out now that if this evidence was admissible at any particular stage of the case, this was the stage; if they wanted to call evidence they must call it now.

Mr. Miller said as to the question objected to he could not call for a more particular answer, and if his learned friend objected to that given he could not help it.

Dr. Madden said His Honor had just pointed out that the witness had suggested that certain payments were to be attributed to capital; the word capital as used here, and such evidence was not admissible. What he objected to was that this was not attributed to maintenance and working; they went further, and said it was to be attributed to capital. There was no reason why this evidence should be admissible; If there was usage prevailing in this country, or any legal ground attaching an extraordinary meaning to the words, let them tell it.

His Honor said supposing the words referred to any art or science, if they used it for the first time here, would they not put expert men in the box and take their evidence as to the true meaning of the words?

Dr. Madden.—Yes; but that rule would apply strictly to words of art,—in building, for instance, say to the words cornices, coigns, or plinths,—and it would be right to take evidence as to what the meaning of the words might be; but where they were words of common import, as to working expenses he believed of every day signification, that is what they would be controlled by. They would be accepted in the ordinary sense in which they might have to be used.

His Honor.—Yes, *prima facie* then had they any evidence to show that these words have any meaning beyond their ordinary acceptation?

Dr. Madden.—They have nothing to show it.

His Honor.—Is it suggested or contended that it is so?

Mr. Fooks.—No; we do not contend that there is any necessity to give the words any other than their ordinary accepted meaning.

His Honor.—You are at one on that, at all events.

Mr. Fooks.—They would now come to the fact as to whether this was maintenance or working expenses, and that was all they desired to call attention to. If they meant that the term working meant working of the traffic only, let them say so, and he would know what to do.

His Honor did not care what the interpretation of the words might be; if it was understood that they were to be taken in their ordinary sense merely, then he agreed that no evidence was admissible.

Mr. Fooks had said that from the first, but he thought they were going to raise it; he therefore had evidence in anticipation. Now the ground was very clear.

Dr. Madden.—Yes, very clear. Now my learned friend acts on our view.

Mr. Fooks.—No, it is you who act on my view.

Dr. Madden.—Very well, I will acquiesce in my learned friend's view.

Mr. Fooks.—Ah, that is quite a different horse.

Dr. Madden.—Well, now may I say what I understood you to say. I understood you to say that in the contract the words maintenance and working have their ordinary signification, but that this particular item is not chargeable to maintenance and working.

Mr. Fooks had said nothing of the sort. He had said that these words were not to be construed in an artificial or technical sense, and he had not said what should be included in maintenance and working. He was willing to trust to the judge and jury to interpret the contract, and not call expert evidence at all. It might be, however, when they came to the point as to construction and working, that somebody might have to give evidence. Then, referring to the Acts of Parliament, he might say, did a particular work come within the definition maintenance and working in its ordinary sense? He did not mean its technical meaning.

His Honor.—Not in its technical sense. In its ordinary sense it would be for the jury to say whether a certain work was working and maintenance. They could not put witnesses in the box to do what the jury had to do.

Mr. Miller protested in the interests of his clients against the course being taken.

Dr. Madden complained against allowing Mr. Miller to take the case out of his learned leader's hands.

Mr. Fooks.—He is only saying what we said yesterday.

His Honor thought if both parties were agreed that the language was to be taken in its ordinary sense and without technical signification, then it was a question for the jury to decide as to whether certain items came within the terms working and maintenance. The question would be what was working and maintenance in its ordinary sense?—what charges would be ordinarily put to maintenance and working? That was where special skill might come in.

Dr. Madden should not press that matter. He could show if necessary that very few, if any, words of art were technical. What was involved here was a question of fact for the jury. He should imagine His Honor would say to the jury that the working expenses were necessary, all expenses, that is, necessary in carrying on the work. His Honor would say that in its ordinary sense—according to common sense—the word maintenance meant that they were to maintain and keep the railway in existence as it was originally,

or as nearly so as possible ; and having said that, the question as to whether they had done so would be for the jury. Did the other side say that these particular works came within this category or not? If they felt any difficulty in the matter he was prepared with such evidence as would make it plain. What he wanted to guard against now was the admission of that which was not evidence.

His Honor said if they had railway experts they might tell them what really was regarded as maintenance and working ; but there was more in the contract. They were to maintain and work in a defined manner, and the contract described how they were to maintain and work. They were to keep and maintain the rolling stock and generally the whole undertaking in good and efficient repair and working condition. Did not that merely include ordinary language ?

Dr. Madden thought it left out the whole question involved in the case. His contention was that the obligation was on the Company to keep and maintain ; and further than that, if the Company did not do it, then the Government could step in and do it themselves at the Company's expense, or they could apply to the Supreme Court to rescind the contract altogether. If they did not discharge the obligation resting on the Company to do it, then the Government had to do it. The question really was, were they—the Company—to find the money to discharge their contract obligations, or were the Government to find it, because the Government would really be finding it if it was to be paid for out of profit.

His Honor said the Company had to construct and to work and maintain the line in an efficient manner, so as to afford all sufficient station accommodation and due facilities for the passenger and goods traffic. The profits were to be ascertained, that is, the gross receipts, and then they were to deduct the cost of maintenance and working, with sufficient facilities for the accommodation of traffic. Was it or was it not a fact that these items were part of maintenance and working ?

Mr. Fooks.—And that view was accentuated by the 16th clause, under which the Company was bound at all times to keep and maintain the whole undertaking in good and efficient repair and working condition.

Dr. Madden.—Let them look at Section 5 of the Act 46 Vict. No. 43, the "Disputes Settlement Act" :—"In the accounts of the said Company to be rendered pursuant to the said contract, the revenue and expenditure for and in respect of the maintenance and working of the said railway shall be adjusted on the principle of yearly balances. The quarterly statements provided for by the said contract shall be rendered and audited as heretofore, but the balance of profit and loss shall be struck yearly ; and if such yearly balance shows a profit upon the working of the said railway for such year, such profit shall be deducted from the guaranteed interest as provided by the contract; and if such yearly balance shows a loss on such year, such loss shall fall upon the Company, and shall not be brought forward to any succeeding year." From that the balance of profit and loss was to be struck yearly, and the guaranteed interest was to be reduced according to the profits. What they had to get at was what was the gross revenue, what was the expenditure, deduct the one from the other, and anything remaining would represent profits of the line.

His Honor thought that was scarcely enough, because the question was what was maintenance and working? Clause 6 of the contract placed the obligation on the Company to work and maintain, as a condition to the interest, and in a certain way. But might that not bear a different meaning? The Company would fulfil that by working efficiently with all necessary station facilities for traffic ; but suppose they wanted extra carriages, were they to take that to mean maintenance and working? That to afford due facilities for working raised the necessity for the carriages.

Dr. Madden.—Certainly not, unless the traffic had increased greatly. They would have to increase their rolling stock out of their ordinary capital. If that were so, the profits would have to supply carriages and then to pay the whole of the working expenses. They could not charge the first cost of the carriages to working expenses, as that would be paying for them out of a proportion of the gross profits. Suppose the Company to buy new engines and carriages and so forth, and the Government exercised its power to buy the railway, they would have to buy back and pay for the very same carriages that had been already paid for out of their proportion of profits. The first cost should be charged to capital account, and year after year the Company should show that they received interest on the amount of capital so expended. When new engines were brought on the line, unless to replace those in use, they would be charged to capital. When the railway started there were ten or eleven engines—there were now thirty.

His Honor.—Suppose they were in England where there were waggon and carriage companies—suppose they were to hire carriages from them, where would that be charged?

Dr. Madden.—That would be working expenses, because it was rental merely, and they sent the carriage back to its owner when done with. In the other case they not only charged the rent of the carriage but they had the carriage in their pocket when they closed the account, seeing that they charged the cost against the Government, which had to pay for it. Section 5 of the 46 Vict. No. 43 said how it was to be done. It was not a question of the contract. This was an Act passed subsequently to settle disputes. It was a declaratory Act and showed that the expenses of maintenance and working were to be given every year. If that showed a sufficient balance of profit the Government might have to pay nothing; if it did not show a balance then the loss was to fall on the Company.

His Honor.—Then the whole case was what was maintenance and working?

Dr. Madden.—Yes, that was the short and simple question ; and he thought it was a question for His Honor to decide as a matter of law. He felt there was a difficulty, and that the question might involve some question of fact upon which the opinion of the jury might be taken. In that case they might call some railway men to clear up any such point. If His Honor thought this desirable, he should be sorry to run the risk of a new trial by excluding the evidence. If taken, perhaps no harm could be done. They would withdraw the objection.

Mr. Fooks had said from the first that personally he regarded the point simply as an academical question. It was only to show whether these charges were due to working expenses that this evidence had been taken and this question put.

His Honor.—But did that go to the question?

Mr. Fooks thought it was so. True, the gentleman who had to examine the witness had got into his head some technical idea, and Dr. Madden objected that it was not a proper question, but as they went on

they would see how it developed. He quite well thought the witnesses said "Yes, that is working expenses;" but when they came to be examined as to capital charges they were bothered. He meant their own counsel bothered them, and his learned friend bothered them still more.

Dr. Madden.—Well, they had better give this evidence at once, and the jury might get something out of it.

The Associate continued the reading of the evidence as follows:—

Q. Then, in point of fact I understand that if it is useful and necessary it comes out of revenue, if it is at all magnificent it comes out of capital? A. Yes, because magnificent works are not required or necessary.

Q. I am astonished. The test is that if a thing is required, anything that is necessary to the working of the line, comes out of revenue, anything that is ornamental comes out of capital,—is that it? A. Yes.

Q. As an engineer and man of business, do you say that is the distinction? A. Yes.

Q. Do you mean to say that the only things chargeable to capital account in connection with railways are those things not required, but merely ornamental? A. Principally so. I would not go to the extent of saying that everything must be tabooed because it is ornamental.

Q. Can you tell me, out of all your 45 years' experience, of any unnecessary work which was charged to capital account? A. Hundreds.

Q. Tell me one instance in which you know of one thing charged to capital account here? A. I thought you meant in England.

Q. As a matter of fact, in Victoria you never knew of an unnecessary thing that was carried to capital account? A. Yes.

Q. Tell us of one? A. All the fine-axed masonry on the Mount Alexander Line was unnecessary.

Q. And was that carried to capital account because it was unnecessary? A. Yes.

Q. So that as a matter of fact the culvert, bridge, or whatever it was that involved that masonry was carried to capital account? A. Yes.

Q. Carried because of its fine axing? A. Yes.

Q. Do you allege, then, that the only reason why these works were carried to capital account was because they were fine axed? A. No, because it was the principal account.

Q. The principal reason why these works were carried to capital account was that they bore some unnecessary fine axing upon them? A. There was an unnecessary outlay upon them.

Q. Can you tell me anything else that went, upon a similar principle, to capital account? A. Any unnecessary elaborations, I should say.

Q. The only things that capital account covers are unnecessary elaborations? A. Yes.

Q. The test is whenever you find an unnecessary elaboration? A. It is one of the tests.

Q. Whenever you find an unnecessary elaboration of the work on a railway, or any portion of the work, you carry it to capital account. You say there is nothing goes to capital account unless—? A. Everything goes to capital account at first.

Q. Everything? A. Everything.

Q. What do you include in everything—what do you mean by it? A. Every culvert, station, and work upon the line goes to capital account.

Q. Where do you draw the line? A. When you have carried out the line as you originally intended.

Q. According to you, that never arrives? A. I don't say that. If your argument holds good, you would never allow the railway to be opened for years. The railway must go on step by step.

Q. As I understand you, what you suggest is this: as soon as your line is opened, anything else you do to it, no matter for what purpose of utility, provided it is utility? A. Yes.

Q. Have you ever in this country had charge of the administration of any railway? A. Yes.

Q. Your whole experience is that you acted as engineer on the Alexandra Line? A. I was on the Government Railway before that. I was Government Engineer for many years.

Q. As a matter of fact, you acted as engineer under Cornish and Bruce? A. Yes.

Q. What else did you do?—what other railway did you construct here? A. I marked out the Deniliquin Line.

Q. You surveyed it? A. I marked it out. I am a Consulting Engineer.

Q. Heretofore you have been a most excellent Railway Engineer? A. An ordinary Engineer.

Q. Have you ever administered the Railway as Accountant, Secretary, or Manager when it was running and earning money? A. No, I cannot say that I have. I have had a lot of experience in the spending of money. I had more than £20,000 a week going through my hands at one time.

Q. You never were troubled yet in your business with the concern as to what portion of a railway went to capital and what to revenue account? A. No.

Re-examined by Mr. Hood.

Q. As I understand your view, when the railway is complete and at work, necessary additions caused by increase in traffic have to be paid for out of revenue? A. Yes.

Q. And necessary repairs also? A. Yes, and necessary extensions of works.

Q. As to this talk about capital: when the railway is first made, the construction comes out of capital? A. Yes.

Q. But afterwards the additions come out of revenue? Yes.

JOSEPH BRADY, *called and examined by Mr.* Hood; *sworn by Mr.* Dickson.

Q. What are you? A. Civil Engineer.

Q. What experience have you had? A. The usual training of a Civil Engineer—about 40 years—since 1845.

Q. In this Colony? A. I commenced my experience in London, and have been out here since 1851.

Q. Have you had much experience in railway works? A. Yes.

Q. Have you read this Contract in this case? A. Yes.

Q. Have you read the various items in dispute? A. Yes, those that are scheduled.

Q. Take this first, "Erection and fitting up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop." In your opinion ought that expenditure to come out of revenue or capital? A. That being an expenditure since the release under that contract, I say it is chargeable to revenue account.

Q. The second item is, "Building the covering and chimney stack for exchange locomotive shop, engine and Cornish boiler, and preparing site for removal of brass furnace, &c.?" A. I understand they are works contingent upon the increase of the traffic, and chargeable to revenue. You may charge it to any account you like, but it must come out of revenue.

Q. "Putting up porch in front of station to keep vehicles from front door?" A. The same applies in that case.

Q. "Addition to station-master's quarters, and repairing and re-painting whole of station?" A. As to the buildings I take them to be necessary. I cannot speak as to the painting.

Q. Assuming that repairing and painting were necessary, would they be chargeable to revenue? A. Yes, of course.

Q. Re-painting the same? A. Re-painting would be working expense.

Q. Fifteen gatekeepers' lodges required—would that be out of revenue? A. These would be additional works conditional upon increase of traffic.

Q. Additional carriages, horse-boxes, &c.? A. When you develop your traffic you get an increased revenue and charge all these things to the revenue account.

Q. Assuming that the traffic is increasing, would such things as additional engines, carriages, horse-boxes, trucks, and gatekeepers' lodges be necessary? A. Without doubt. The contract provides for two trains a day. I understand that more trains run now, and you must have engines and additional rolling stock for them. You develop your business.

Q. Are gatekeepers' lodges necessary? A. Without doubt they are.

All the above evidence objected to by Dr. Madden.

Cross-examined by Dr. MADDEN.

Q. I understand you to say that these lodges are chargeable to revenue because they are not chargeable to anything else? A. You may understand it in that way, but I said that when the railway was completed and taken over by the Government only two trains ran each way, one 23 and the other 12 miles an hour, and would not require a singe gatekeeper's lodge on the whole length.

Q. Do you adhere to what you said before that you would put lodges to revenue account because they are not chargeable to anything else? A. That would be an absurd answer. What I say is this: running a railway train at 23 miles an hour is a very moderate speed, but if you run a railway train at a higher rate of speed, it may become necessary to erect lodge gates for the safety of the cross-country traffic.

Q. I quite admit at once that these are very desirable and very useful and valuable indeed, but the question is, when they are put up what account are they to be paid out of? A. Without doubt, out of revenue.

Q. Are you an accountant? A. No.

Q. Have you ever kept accounts in your life? A. Not as "professional accountant."

Q. You have never in any sense as a professional accountant kept accounts? A. No.

Q. Have you mastered the distinction between capital account and revenue account? A. I am not a professional accountant.

Q. Have you, as a professional accountant or otherwise, achieved the knowledge of the distinction—the technical distinction—between revenue account and capital account? A. No.

Q. Have you ever had anything to do in your life with the management of railways? A. Not very much.

Q. Have you ever had anything to do with them? A. Yes, a little.

Q. In what capacity? A. As manager.

Q. On what railway? A. Sydney and Parramatta Railway; nothing worth talking about.

Q. You acted, I understand, as Engineer? A. As Engineer and Manager.

Q. What does the management mean in that sense,—Engineer or Traffic Manager? A. Traffic.

Q. An Engineer may not be a Traffic Manager? A. No.

Q. At this time you were a sort of superior station-master? A. There was a Traffic Manager under me. I had nothing to do with the keeping of the books.

Q. Do you look upon a gatekeeper's lodge as an essential to a railway as soon as the traffic becomes developed? A. In this sense, that as a man has to be on duty day and night he must have some place to live in.

Q. Is it essential to have a gatekeeper at all? A. That depends. They do without them in some countries.

Q. In America, on the thousands of miles on which there are none at all? A. In America on some of the lines they have only three trains a day.

Q. Then a gatekeeper is merely a luxury? A. It depends entirely upon the country you are working in.

Q. If it can be done without in one country it can be done without in any country. If I understand your contention, it is that anything that is necessary to the equipment or good management of a railway comes out of revenue? A Or the improvement thereof. Do not take any country—take Victoria; I know something about that. We find that it has become an absolute neccssity to have gatekeepers, male or female, and they must have places of abode. Gatekeepers' lodges are put up from year to year as the traffic developes itself. What account they are charged to in this country I don't know.

Q. That makes all the difference. They may be necessary to a railway, and I understand you that if they are essential to the railways they are to be charged to revenue? A. With a difference. Allow me to

say this: In England the railways are all built and owned by companies; some of them were in Victoria; but all the railways are now practically built and owned by the Government, and the management of the Victorian railways have nothing to do with the management of a single shilling in any shape or form. All the money obtained from the Victorian railways goes into the Treasury, and then to adjustment of accounts; and it may not apply to the case of a railway constructed under a guarantee in another country by a foreign company such as the Tasmanian Railway Company.

Q. Have you seen these stores at all yourself? A. No.

Q. Or any of the buildings? A. No. I have not been there.

Q. Except what somebody has told you you have not the least idea of them? A. I have had certain printed papers placed into my hands; I know nothing whatever about it except that.

Q. Are you acquainted with the fact that the Government of Tasmania is entitled to share in the profits of this railway over 6 per cent? A. It is so stated in the Bond.

Q. Does that strike you as making any difference as to what should go to capital account or not? A. I am not an accountant. I am not competent to reply to that.

Re-examined by Mr. HOOD.

Q. In the present case you consider these items should be paid for out of revenue? A. Without doubt.

GEORGE GORDON, *called and examined by Mr.* HOOD; *sworn by Mr.* DICKSON.

Q. What is your business? A. I am a Civil Engineer.

Q. What experience have you had? A. Since 1851.

Q. Have you had experience in railway works? A. No.

Q. What work have you been carrying on? A. Hydraulic works, harbours and rivers, irrigation and draining.

Q. Have you read the Contract and particulars in this case? A. Yes.

(Reading.)—"Erection and fitting up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop." In your opinion, in this case ought that to be paid for out of revenue or capital?

Dr. Madden objected.

A. Out of revenue.

Q. "Building the covering and chimney stack for exchange locomotive shop, engine and Cornish boiler, and preparing site for removal of brass furnace, &c." Ought that in this case to be paid for out of revenue or capital? A. That is of the nature of a renewal, so it ought to be paid for out of revenue.

Q. "Putting up porch in front of station to keep vehicles from front door"—is that revenue or capital? A. So far as it is necessary from the increased traffic I think it is chargeable to revenue.

Q. "Addition to stationmaster's quarters, and repairing and repainting whole of station, &c.?' Revenue.

Q. "Gatekeepers' lodges, erection of 15 lodges, for which a rental of 3*s.* and 4*s.* per week each, according to size, is charged?" A. Yes, I understand that that is in lieu of increased pay to the men. And if they had been paid increased wages it would have been chargeable to revenue. If they got huts built for them it is fairly chargeable to revenue.

Q. "Carriages and waggons—5 new second-class carriages, 2 second-class excursion carriages (double-bogie), 4 horse-boxes, 12 low-sided trucks, 1 travelling crane, &c.?" A. Renewals, chargeable to revenue.

Q. Assuming that all these things have been caused by increased traffic, would they be necessary and proper things to build? A. Yes, after the completion of the line.

Q. For the accommodation of the public? A. Assuming them to be caused by increased traffic.

Q. Should they be paid for out of revenue or capital? A. Out of revenue.

All the above evidence objected to by Dr. Madden.

Cross-examined by DR. MADDEN.

Q. Have you ever had anything to do with a railway? A. No, nothing.

Q. Have you ever had anything to do with accountantship? A. No. I have had to keep the accounts of works, &c.

Q. Now, you have stated here that certain items dictated to you or mentioned to you were chargeable to revenue account? A. Yes.

Q. Would you tell me the principle which guided you as to what goes to capital and what to revenue account? A. After the work is completed any additions that are wanted for the development of the traffic on the completed line; not extensions of the line. Anything required for the accommodation of increased traffic or renewing stock, or keeping the line in repair, and for the efficient working of the line.

Q. I understand you that the erection of new buildings where buildings never were before would come within the category that you have mentioned? A. They might or might not.

Q. If they provided accommodation to the passengers? A. If it were necessary for the accommodation of the public.

Q. Anything of that kind would be payable out of revenue? A. Yes, I think so.

Q. You spoke just now of "exchange locomotive shops": the question was put to you and you answered it and said that it should come out of revenue? A. Yes.

Mr. HOOD.—It was "a chimney stack in exchange locomotive shops?" WITNESS.—The chimney stack was necessary because of the renewal of the engine, the engine put in being of a different kind from the one used before.

Q. What do you mean by a chimney stack? A. The stack of the furnace.

Q. What do you mean by exchange locomotive shop? A. What I understand is this: the old engine that they used was a portable engine, and did not require the chimney stack. That wore out and they replaced it by a new one.

Q. The question put to you is, what is an exchange locomotive shop, and I want to know as a matter of curiosity what that is? A. I only spoke as regards engine and chimney; I did not see the shop.

Q. Then it does not matter what the shop may be or for what purpose it exists, the chimney should go to revenue account? A. Yes, the renewal and replacing of new engine required the chimney stack.

Q. Supposing you start a chaff-cutting establishment, and you run a machine for a certain number of years. You wear it out, and then go and buy a very much more expensive and modern engine. Would that go to repairs or capital? A. I would put it to renewal.

Q. You would put that in the same category as a coat of paint on an existing building? A. Yes.

Q. Have you seen these places spoken of? A. Some of them.

Q. When? A. I saw them last about a fortnight ago.

Q. In Tasmania? Yes.

Q. Which of them did you see? A. I saw these gatekeeper's houses, and I saw the store. I did not examine it critically.

Q. You are aware that these gatekeepers' lodges were never in existence before. They were absolutely new, a new idea altogether? A. They were in existence before the line was finished.

Q. Do you think that that new addition to buildings is a mere matter of revenue or working expense? A. Yes, because they were given in lieu of increased wages to men.

Q. Are you aware that the Tasmanian Government is entitled to share in the profits above 6 per cent? A. Yes.

Q. Do you think that makes any difference? A. I don't think so. What is fairly chargeable in one case would be chargeable in another.

Q. Supposing that under the Act of Parliament authorising this contract this company is bound to make all new works? Would that make any difference? A. No.

Q. The Government being its partner or sharer of profits? A. That is an interpretation of the agreement. I don't see that it makes any difference.

GEORGE THEODORE ADAMS LAVATER, *Accountant Victorian Railways, called in and examined by Mr.* MILLER.

1. What is your name? George Theodore Adams Lavater.
2. You are Accountant for Victorian railways? I am.
3. What experience have you had? Nearly twenty-eight years in connection with railway accounts, and seventeen as railway accountant.
4. Have you read the contract relating to the present case? I have.
5. Do you retain a sufficient recollection of the clauses? Yes.
6. More especially of the 6th clause? Yes.
7. Have you seen a list of the items of expenditure which the Government object to allow? Yes.
8. Speaking generally, what would you term that expenditure? Some of these items are chargeable to maintenance, and some—the new works—to the construction account.
9. You have heard the evidence as to the mode in which the different works have been constructed? Yes.
10. Take the first item, then—"(1) Hobart, erection and fitting up internally of store in Hobart yard, and alteration of original store to form continuation of carpenter's shop, £346 8*s.* 2*d.*?" The alteration I should say would go to repairs, unless the alteration was in excess of the value of the original work, in which case it would be chargeable to capital, if there were any capital to charge it to.
11. And what portion to maintenance? Anything in the shape of alterations or repairs would go to maintenance; anything absolutely new would be charged to the construction account, and paid for out of capital, if capital existed.
12. The opinion you are giving is without reference to the terms of the special contract? Oh, certainly, I am speaking only of what is the general custom on railways.
13. And are you speaking also of the terms of a railway just opened for traffic? Certainly.
14. Your answer is, then, that a portion is chargeable to repairs and alterations, and a portion of it to capital, if it existed? Yes.
15. Now take the next item—"(2) Hobart, building the covering and chimney stack for exchange locomotive shop, engine, and Cornish boiler, and preparing site for removal of brass furnace, &c. £721 13*s.* 5*d.*?" According to the evidence I heard to-day it appears that the engine was simply a renewal. They sold the old one, and the new one was obtained in its place. That would therefore be chargeable to maintenance and not to capital.
16. And the residue? Of course I could only say by examining the accounts, and, if necessary, by obtaining a certificate that the work was absolutely new. I may state that there is always a difficulty in preventing charges to capital. The rule is, never to allow a charge to capital unless well authenticated, because it is done to make the earnings of a line appear greater.
17. Are you enabled to say whether the larger or smaller portion of that £721 13*s.* 5*d.* would be chargeable to capital or to maintenance? It mainly depends upon the cost of the engine.
18. Take the next item: "(3.) Hobart, putting up porch in front of station to keep vehicles from the front door"—how should that be charged? That happens to be an entirely new work that never existed before. It is an addition to the Station, and we should place that to the capital account, if such a small sum is considered worthy to be treated as capital. When the line is on a small scale it might be necessary to charge all absolutely new work to capital.

19. Take No. 6: "Gatekeeper's Lodges—Erection of 15 lodges, for which a rental of 3*s.* and 4*s.* per week each, according to size, is charged, £736 14*s.* 11*d.*"? If no lodges existed before, the whole of them must necessarily be new work.

20. And if some of them were in substitution of old habitations? Then they were renewals.

21. No. 7: "Carriages and wagons—5 second-class carriages, 2 second-class excursion carriages (double bogie), 4 horse-boxes, 12 low-sided trucks, 1 travelling crane, £3827 18*s.* 8*d.*?" If the whole of these were required, in addition to the stock then upon the line, for the purpose of working the increased passenger and goods traffic, and affording the necessary accommodation for increased traffic; if they were to be positively added we should charge them to capital; but if any of them were simply taken in anticipation that others were nearing their lives' end, and in order that these should be taken off and good ones should replace them, they would be a fair charge against the renewal fund.

22. Now, the items, "Two new engines, Nos. 15 and 16, five new second-class carriages, three new horse-boxes, ten low-sided trucks, five new cattle trucks, six new platform trucks?" The remarks that I have made respecting the rolling stock in No. 7 apply to those.

23. Now take the last item—"Trustees' remuneration, as voted at general meeting, 26th June, 1883: three trustees, each £157 10*s.* for six years' service at £26 5*s.* per year—£472 10*s.*?" That is for working expenses.

Dr. Madden submitted that such a charge could not be subject to a railway expert's opinion.

Mr. Miller.—We say this is a fund created for working and maintaining the railway.

His Honor.—You have no evidence as to what it is at the present moment.

Dr. Madden.—If my friend can put it in that way, the answer may be given.

24. *Mr. Miller (to Witness).*—As it appears there, what would you call it?

His Honor.—What does it mean?

Witness.—It means that the directors have received as fees £472 10*s.* I should charge it to the working expenses as part of the cost of administration.

25. *Mr. Miller.*—Turn to the sixth clause: can you inform us whether your evidence would in any way be controlled by the fact of there being no capital?

Dr. Madden.—That is coming to the interpretation of this particular contract. He says that under "ordinary circumstances" they are charges to maintenance and working.

26. You have limited your answers by the expression "if there is capital." Assuming it was contemplated that there should be no capital available for what would go under capital expenditure, but only for receipts and expenditure. In such a state of things as that, can you tell us what these items would be debited to?

Dr. Madden submitted that the witness could not give evidence on the point, which was a question as to the interpretation of the contract. If it did not it was irrelevant, and if it did it was usurping a function that belonged to His Honor.

Mr. Miller.—The witness has limited his former answers to the statement "if there is capital." I now ask him, if there is no capital, to what fund the items would be charged? Under these circumstances I may ask the question.

27. *His Honor.*—Is there any known usage? *Witness.*—Yes, as shown by the balance sheets the capital account is added to from revenue.

Mr. Miller.—We are presuming that it is an ordinary trade usage.

His Honor.—It is one of those questions which take up a lot of time, and really we have nothing at the end. Do you know of such a usage outside Victoria? *Witness.*—Yes, it is the ordinary trade usage everywhere to add to the capital account from revenue if you have no further capital to work with.

28. *Mr. Miller.*—It is recognised everywhere? *Witness.*—Yes.

29. Assuming this to be one of those instances in which the Company have no capital, to what fund would you debit them to?

His Honor said the question was merely a repetition of a previous one. It had just been stated they must go to revenue.

30. *Cross-examined by Dr. Madden.*—I understood you to say, as to this first set of items, that the new work is not chargeable to revenue? Not ordinarily. I may say this much, that where the amounts are very small they may be charged to revenue.

31. But if an alteration is made of existing work, it is chargeable to revenue? Yes.

32. Suppose you have a house, and a new house is built, and 300 feet of American lumber is taken from the existing shelves, would you charge part of the new house to the capital account, and the remainder to revenue? Yes.

33. Would you charge three boards of lumber to repairs? Yes.

34. Why? Because they are old stuff. I will explain. There were shelves in the place before, which were simply transferred from one place to the other. That is not new work.

35. Suppose you had a building 100 yards away, and men were employed to put new shelves in that building. Would that be new work? Yes.

36. You say that because these 300 feet of lumber are taken from one place where they are not wanted and put in another new building they should be charged to the revenue account? Yes.

37. If a man is employed doing partly new work and partly old work, you know that the new work is charged to the capital account and the old work to revenue? Yes.

38. You draw the line very finely? It is done in dozens of instances in Victoria, sometimes to the extent of 1*s.*

39. Do all alterations come out of revenue? I say it is the general rule—the well recognised practice—that alterations go to revenue.

40. You know the documents that are prepared, under your own superintendence among other people, for applications for money out of loans for railway purposes in Victoria? Yes.

41. In the document produced, under the head alterations you see the sum of £300,000? Yes.

42. And if you had 3*s.* 6*d.* revenue mixed up with £300,000 of capital, would you charge one to capital and one to revenue? Yes.

43. As a matter of economy what would you do. I wish you to answer from your experience as an accountant, is what you have stated done? Yes, it is done.

44. Can you tell me a single instance where 3*s.* 6*d.* has been taken out of a large sum and charged to revenue? Yes, I can show you instances.

45. Can you produce such an instance? I can find cases for you, and can assure you that as low a sum as 6*d.* has been taken and so charged for years in succession.

46. That being so, out of the abundance of your knowledge can you now tell me one case? I can find them by the score.

47. Tell me a single instance? They do it in our engineers' office, and I am obliged to accept it as verified if I am satisfied it is correct.

48. In this second item "building the covering and chimney stack for exchange locomotive shop, engine and Cornish boiler, and preparing site for removal of brass furnace, &c., £721 13*s.* 5*d.*," you say that if the engine which was purchased was to replace an old one it would be chargeable to revenue; and all the rest to capital? So far as I can see.

49. Will you turn to the paper and see if there is any engine mentioned at all? I said at the time in my evidence that I had heard it stated that there had been a new engine purchased in place of an old one.

50. As a matter of fact, suppose the building charged for there is a shop and foundation for the furnace? Well, under ordinary circumstances it should be charged to capital account; but I cannot speak as to this being a new work unless I see the account.

51. As to the rolling stock, you simply say that if it is to replace rolling stock that is worn out, it is chargeable to maintenance; if it is new rolling stock it is chargeable to capital? Yes; but it may be purchased in anticipation of renewals.

52. Every addition is put there in anticipation—supposing that it is wanted? That is a different thing. One may be wanted to meet the increasing and growing traffic, and one may be a prospective addition for the purpose of replacing that which is immediately going to die.

53. If all that wanted replacing were replaced, and the additions were got for the purpose of the increased traffic, they would be chargeable to capital, and not to revenue? From your way of putting it, yes. I have not seen the accounts, and therefore cannot say.

54. *Re-examined by Mr. Miller.*—Supposing some of the engines were sure to die, and engines were purchased to replace them? I think they would be chargeable to renewals.

55. And do you think that would be in any way affected if, in order to prolong the dying, they were used in any way? I think it would be foolish to throw them away while they are of use, and while they can do a little work.

56. So that nominal increase of new engines should go to renewals? Yes. It is the duty of the Auditor to see that the revenue charges are full and adequate, and that more is not charged to capital than is right. It is bad financing to charge to capital if you can help it.

57. Supposing there was a small new building, and a very large repair to an old one, or conversely—would that affect the principle? No, the principle is the same.

58. As a matter of convenience you often shunt the obligation? Yes; sometimes I will say charge it to revenue. I don't like to see small charges against capital.

59. *Re-examined by Dr. Madden.*—Did you ever know a case in Victoria in which a new engine was put to the revenue account? Only when they have been put on to replace old ones.

60. Do you know Mr. Kent? Yes. He has been my sub. for many years, and a good one too.

61. If Mr. Kent contradicts you upon this point, and states that it never has been done, can you contradict the statement? No; I could not contradict him, but I believe we have done it.

His Honor suggested an adjournment.

Dr. Madden was in the hands of the Court.

Mr. Fooks thought it would be convenient to adjourn now, it was getting dark.

His Honor expected the case might have been finished by Saturday, but he did not think they would be able to get through it then. The Court sat in Banco on Friday, and he should have to throw the case over for that day.

It was decided to take the evidence of the next witness.

ROBERT CHARLES PATTERSON, *Civil Engineer, examined by Mr.* RITCHIE.

1. You have seen the Main Line Railway contract? I have.

2. Will you turn to the first item of the account in your hand—the first disputed item—the erection and fitting of a store? Yes.

3. According to the general usage of railway accounts, to what account would such an item be charged? All new works on railways are generally charged to construction account. I should have to know the details of the item to say what part should be charged to construction and what to maintenance. I may say that my answers will be somewhat misleading unless as relating to the contract and the guarantee by the colony.

His Honor.—Quite so. But we can only examine you as to what the usage is on railways generally. As to the contract, that is another matter. If we can get the usage, that is what we want. We want your assistance as to any term of art that may be involved. The legal construction of the contract is unfortunately with myself.

Witness.—Fortunately, I think.

His Honor.—Well, I don't know about that.

Examination continued.

4. To what account would you charge that item? If it is an addition to the original work it should be charged to construction.

5. And if mixed? If it is a mixed item consequent upon any part of the old structure having fallen into disrepair, then that portion should be charged against maintenance.

6. Would you divide it if possible? Yes; so much should be charged as new work to construction account, and so much to maintenance.

7. Now, with regard to the next item, the exchange locomotive shop? The same rule would apply to the new work here. I gather from what I have heard, that the Government have allowed so much for the old boiler and the purchase of the new. The additional new work would be charged to construction.

8. Would that be the whole of the item or part of it? I lay down the general principle, that that which is restitution or renovation of existing works is chargeable to maintenance, and that which is entirely new is chargeable to construction. I have not seen the work.

9. Now the third item, £91 13*s.* 11*d.*? That is a construction charge entirely.

10. Now, as regards item No. 6, the gatekeepers lodges? In so far as the lodges are to renew lodges previously in existence, they would be a charge to maintenance; where they are new entirely they would, under ordinary railway works, be a charge to construction.

11. Now as to item 7, rolling stock, how would you charge rolling stock? The same principle runs through the whole of the items. In this case carriages and waggons obtained to keep up and maintain the efficiency of the stock, or to replace that which was in existence, would be chargeable to revenue or working of the line. That which is new and absolutely additional to the stock in existence would be chargeable to capital.

12. Is it possible to divide the item? It might be extremely difficult.

13. Suppose it was impossible to divide the item, what then? Then I can only go back to my experience in South Australia for eighteen years. There, where we were in such a difficulty, the Government would have placed the item on the estimates of expenditure of the colony, and it would be voted from the general revenue.

14. *His Honor.*—Is that a matter of usage, or only the plan adopted in the colony. The question is, what is the usage? I can only express an opinion drawn from my experience.

Examination continued by Mr. Ritchie.

15. Do you limit it to that?

His Honor.—That will not do. It must be, what is the general usage? *Witness*—The late witness stated that in Victoria new engines have been charged against revenue; that may have been done. In South Australia it has been repeatedly done.

16. *His Honor.*—Do you mean new engines altogether in relation to number? *Witness*—They have been provided on construction estimates, partly to increase the number and partly to increase the power.

17. *His Honor.*—New engines might be requisite, because they are of more perfect manufacture than those in use, or because it was desirable to increase the power. Do they go to capital or revenue account? *Witness.*—They go to capital account.

Examination continued by Mr. Ritchie.

18. Now as to item No. 8 and 9—the two new engines 15 and 16, how should they be charged? On precisely the same principle.

19. Then all the following items would be in the same category? All in the same category.

20. Would there be no difference if some of the engines had been nearly worn out, or if new ones were got in anticipation of some being broken up? I have already stated that where provision is made for replacing engines running, and nearly at their last life, the amount would be charged to the working expenses of the railway.

The Court adjourned until 10·30 on Thursday.

Thursday, 9th May, 1889.

The Court sat at 10·30 A.M.

Mr. Miller said the jury had asked for particulars of the items in dispute. He purposed to hand them the printed papers of particulars of expenditure.

Dr. Madden thought that would not assist them. It did not tell the jury in respect of what the reductions were made in accordance with the contract. The paper referred to gave the demands made by the Company, but was not an accurate statement of the items in dispute.

His Honor.—And that is what the jury want.

Dr. Madden.—Yes, that would be of service to them.

The Foreman (Mr. Walch) said the jury wanted the statement of the items of 1882. They had only that of 1883.

The papers were handed to the jury accordingly.

HENRY COATHUPE MAIS *called and examined by Mr.* Miller.

1. What is your name? Henry Coathupe Mais.

2. What are you? I am a Civil Engineer.

3. Of what standing? I have been practising my profession for forty years.

4. Had you any position in England?—do you belong to any College in England? I belong to the Institute of Civil and Mechanical Engineers in England.

5. Have you had colonial experience of the management of railways? Yes. I was for four years Manager of what was called the Southern and Suburban Line from Melbourne to Brighton and Hawthorn, and I was General Manager in South Australia for nine years.

6. Had you any English experience of management? No, mine is entirely colonial experience.

7. In the course of your experience have a number of railway contracts come under your notice? Yes, a large number.

8. In the whole course of your experience have you seen a contract similar in its terms and conditions to that now under notice? No, I have seen nothing like it before.

9. Now, I will not ask you for an interpretation of that contract, though you may be prepared to give it.

His Honor.—That is immaterial, Mr. Miller, and an unnecessary digression.

Mr. Miller.—I have done with it.

10. You have seen the items objected to in the accounts between the Company and the Government? I have.

11. Generally, I would ask if they are in accordance with the general usage as to what would come under the terms maintenance and working after the completion of the construction of a line, and after the opening of the railway for traffic?—what would be the general usage as to what would come under the terms maintenance and working?

His Honor.—Is there a general usage?

Witness.—There is. There are several exceptions to the general acceptation of the word, not in relation to the contract, but in a general sense. There is a large variation. There are deviations from the usual acceptation of the term.

12. *His Honor.*—We want to know if amongst railway men there is any general usage as to the meaning of the terms maintenance and working? I think the terms are general, and understood in their general sense.

13. *His Honor.*—In the ordinary sense in which they are understood in the English language? Yes.

14. *His Honor.*—But, as an expert in railway matters, have they any other acceptation? I don't think so. They may have been departed from widely in usage.

15. *His Honor.*—Is it a common departure? No, it is not a common departure. There is no general usage.

16. *Mr. Miller.*—Is there any universal usage?

His Honor.—We have come to this at last, that there is no general usage, and the words have the ordinary acceptation included in the terms repairs, alterations, and renewals.

Witness.—There are several items that you could not repair, rails for instance. Those you can't repair you must renew.

His Honor.—Altered engines or sleepers would be known as repairs and alterations, and renewals or maintenance would be what is beyond, as new work or construction. There seems a consensus of evidence that this is so.

Dr. Madden.—That is universal.

His Honor.—The evidence of the Commission is that all new stock should go to revenue.

Witness.—That depends a great deal on the length of purse of those who own the property. If it is an impecunious Company they must of course take it from some other source.

17. *Mr. Miller.*—Then I understand that as to Government and Companies' railways the practice varies? I think it does. Yes, it does vary.

Mr. Miller.—Perhaps, then, the true meaning of the words would be the usage of the majority.

Dr. Madden.—That is not a usage.

Mr. Miller.—Come to the fact.

18. *Dr. Madden.*—Can this gentleman undertake to swear to the usage of a majority? He has not been Chairman or a Director of Railways.

His Honor.—It must be the general usage. If there is a choice of two, it would not be important to the interpretation of this contract.

Mr. Miller.—What my learned friend said went to universality.

Dr. Madden.—You overhaul the dictionary and you will see what is its ordinary dictionary meaning.

His Honor.—There can be no general usage where there are two interpretations. The majority may use the words in one way, and the minority in another.

19. *Mr. Miller.*—Then I will refer to the particular words used in the evidence. I don't ask which it is, the majority or the minority. (To Witness)—Have you yourself visited the yards at the Hobart station? I have.

20. Have you had pointed out to you the first item in the particulars of demand? I have.

21. From your own personal inspection are you able to say whether there is any work in that which would necessarily come under the head maintenance in any acceptation of the term? Allow me to have the item in my hand. [The paper handed to witness.] Yes, I think so. I think any alterations of that character certainly would be debited to maintenance and working. The item referring to the alteration of the store to form a continuation of the carpenters' shop, that should be a debit to maintenance and working.

21A. Are you enabled to say whether the alteration was in point of fact a substantial expenditure? Yes, it was. I went carefully into it.

22. *His Honor.*—Is it new work? I understand it to be entirely new, except the fitting up inside.

23. *Mr. Miller.*—The store itself having been a new building of galvanised iron built in substitution for the original store building? Yes, quite new.

24. Entirely—the fitting up of it, that was the old fitting up? The fitting up of the new store consists of fittings up such as bins, tables, shelves, &c., places for keeping the stores in—ordinary office fittings.

25. Would that constitute an alteration, the internal fitting up? It was the material of the old store transferred to the new, with some additions. The fittings were slightly altered, no doubt.

26. Would any part of that fitting up internally form, under your interpretation—would it form a proper charge on revenue? I think so.

27. Would it be part of the working expenses? Yes, working expenses, certainly. You could not carry on the business without it.

28. Then, as to the residue, the alteration of the original store, I understand you would charge the whole of it to working expenses? Yes, I should charge it all to working expenses.

29. Is it your opinion that the only thing that is new work is the erection of the new store? That is it; all the rest is working expenses, the other is construction.

30. I don't know if you can give us a guide as to what proportion of the item is for working expenses? No, I could not. It would be a substantial amount, no doubt. The fittings in the new store removed from the old store would represent a fair sum.

31. I now turn to the second item: "Hobart—building the covering and chimney stack for exchange locomotive shop, engine and Cornish boiler, and preparing site for removal of brass furnace, &c., £721 13*s.* 5*d.*" Have you seen that work? I have.

32. In your opinion is any portion of it fairly chargeable to maintenance and working, or to working expenses? I should think so. It is the replacement of an old work done in a more substantial manner than it was originally, by the fact that what was there before was not covered substantially. This is a new engine, having a substantial covering. The stack is used for a dual purpose, for the new engine and for the brass furnace.

33. Then that would go to working expenses? I think so.

34. "Putting up porch in front of station to keep vehicles from the front door—the third item in the account—what would you say that should go to? That, I think, is an addition. It is substantially a new work.

34A. And you think not chargeable to working? I think so.

35. Turn to item 6, gatekeepers' lodges—erection of fifteen lodges, for which a rental of 3*s.* or 4*s.* per week, according to size, is charged, £736 14*s.* 11*d.* You were in Court and heard the evidence given yesterday, that these were built in substitution of other erections? Yes, I heard it.

Dr. Madden.—That is not in evidence. Mr. Nairn distinctly said that some of them were not.

His Honor.—But some were.

36. What is your evidence as to these—are any chargeable to working expenses? Those substituted for others certainly were, without doubt.

37. But all the others? It is questionable if the others would be. There are rentals charged.

Dr. Madden.—We can't have this. It is an opinion.

Witness.—My idea is that if it was necessary to get lodges built as much to induce men to live at their work as to save the Company having to pay higher rates of wages. The Company saved it in rent, and it was an inducement for good men to stay. That might be charged to working.

38. Then, according to your view, do you think that brought it within the category of working expenses? I think so, on that ground.

39. That is, that it effected a clear saving in the working of the Railway? I think so; the men would not stop without.

40. I will now come to items 7, 9, 10, 11, 12, 13, and 14, relating to rolling stock. You heard the evidence given as to the rolling stock continually used, and you heard the evidence as to the life of it. Is any portion of this rolling stock properly chargeable to working expenses? Oh yes, of course; in the first place engines absolutely worn out and renewed by replacements would go to maintenance.

41. *Dr. Madden.*—Would any of these items be chargeable to revenue? He now assumes on that, that they were absolute renewals, and not new and original stock. Mr. Cundy was the only man who could swear on the subject, and he gathered from his evidence that these were not renewals, but that they were all additional to the original stock.

His Honor.—Oh, yes, and Mr. Ellis has sworn that all were additions; that they were new stock beyond the first stock, and not renewals.

Mr. Miller.—That is, that they were not old ones repaired or replaced.

His Honor.—Mr. Ellis had sworn distinctly that they were not renewals, but that these were additional stock.

Mr. Miller.—In other words, an increase in the number.

His Honor.—Yes. The renewal of old ones was not included.

Dr. Madden.—Mr. Cundy told them that any new engines brought to replace old ones were marked with the number of the old engine, and he said all the others were numbered on from that.

His Honor.—He said that they were numbered from 1 to 11. Engines brought to replace any of those would not be numbered on from that, but take the same numbers; new engines would receive a new number?

Mr. Miller.—Yes, but I did not understand that none of these engines bore the original number; if there is any doubt, of course Mr. Cundy can be re-called. I understood that those that went for the original number received a new number if an increase in the actual number—if there were originally twelve engines that they would be numbered 13, 14, 15, and so on—if they were actual replacements in consequence of the decaying condition of the old engine that they then bore the original number.

Dr. Madden.—They said that new engines bought to replace others bore the old number, but none of those were such.

42. *Mr. Miller.*—Yes, when the decayed ones died. He would then take it on a hypothesis, and take it in both alternatives. Suppose it was entirely an addition in point of quantity to the original stock, to what fund would it be charged?

Witness.—Do you mean in the ordinary mode of treating them?

Mr. Miller.—Yes.

Witness.—If they were necessitated by the increase in the traffic or in anticipation of the decay of engines in use, I think they might be fairly charged to revenue, according to the amount they would be fairly chargeable to revenue. The amount would, of course, be distributed over a series of years according to the magnitude of it.

43. Suppose some were got in anticipation of the necessary decay in a year or two of the old stock, although not absolutely wanted for immediate requirements, how would you charge them? I should charge them to the same account—I should pay for them out of revenue.

44. If they were in anticipation of replacing those absolutely in hospital—absolutely decayed? That is, of course, involved in my former answer. You can't work a line of railway and have all your engines running at the same time. You must have engines always laid up, and you must have engines dying out. Others must, of course, be got in anticipation of replacing those which are dying out.

45. You have got a copy of the account; look at items 15 and 16, gatekeepers' lodges at Austin's Ferry and ditto at Willows: that would come under the same category? I think so.

46. As to the Trustees' remuneration, £472 10*s.*? I don't know anything about that; I don't profess to be an accountant.

47. I will ask you generally. To what account does the cost of management go? To general expenses, I presume.

48. And would Directors' fees fall under the cost of management? Always.

His Honor.—But these are not Directors.

Mr. Miller.—I take it generally.

But suppose a scheme of management necessitated the services of certain persons in a particular capacity, would their remuneration be charged to expenses?

Dr. Madden.—That is a question that cannot be put unless you put it as a hypothesis. What is the good of asking for evidence on a fact, in the face of the fact that these are not Directors' fees.

His Honor.—Yes, you have got evidence as to charging the cost of management. All the cost of management goes to this account. If this was the cost of management it would, of course, be similarly charged.

49. *Mr. Miller continues examination.*—In your evidence as to rolling stock, as to the proportion of the rolling stock chargeable to revenue, have you taken into consideration the depreciation of rolling stock?—Say the sum total of the rolling stock is £100,000, the depreciation of this at 7½ per cent. would be £7500 per annum, and should have been put away in 1882 to the years of depreciation. The new rolling stock only represents a small proportion of this amount. Have you taken the circumstances of that hypothesis into your consideration in giving your evidence? I did, in effect.

His Honor.—If what I see in the evidence is correct on the charge of depreciation, when one engine was worn out then a new one replaced it. You can't charge for depreciation in the first instance, and then take the whole depreciation afterwards.

Mr. Miller.—That is not the fact.

His Honor.—According to the evidence all depreciation has been made good by renewals.

Mr. Miller.—That is part of the annual cost which we are entitled to under ordinary custom. We say that the increase in the rolling stock was a necessity from depreciation, for which we are entitled to be paid. We can't get the precise total that had been allowed for; whether we state an account for depreciation or render it unnecessary by purchasing stock to replace it, it is the same thing in the end. We ask only to be allowed for depreciation in one shape or the other.

His Honor.—You have it in the shape of renewals. You can't have it in the shape of depreciation also.

Mr. Miller.—I raised the point because my learned friend said that everything that was absolutely new must go to capital account. This was not a similar case, because although these engines were absolutely new, they were the result of depreciation.

Dr. Madden would like to see a balance sheet in which the account was so stated to the shareholders of any Railway Company.

Mr. Miller.—You would like a good many things, no doubt; so should I.

His Honor.—It is clear that depreciation must take place. In the case before us the question is as to what has been done. As he understood, it had been made up by renewals. In that way, instead of annually putting by a certain amount to a renewal fund, you take what you want out of revenue.

Mr. Miller.—Yes, of course we don't want it both ways. My learned friend asked if there was ever a balance sheet produced in which depreciation was charged in this way. He had a balance sheet of the London and North-Western Railway Company in which it was so charged, and there was the answer.

50. *Cross-examined by Dr. Madden.*—By what I understand, your experience has been wholly in the Colonies? Oh, no.

51. I mean as to the management of railway works? Yes.

52. And I may say for the most part in South Australia? Yes, under the Government; and a large part in Victoria. I was there six years.

52A. Under the Melbourne and Hobson's Bay Company? No; on the South Suburban Line.

53. Oh, on that terrible little line!—that which Mr. Higgins constructed; that terrible little line, where we had that trip?

Mr. Miller objected to his learned friend giving them his personal experiences. They had nothing to do with his little trips.

54. *Examination continued.*—You mean the line constructed many years ago, from Prince's Bridge to Hawthorn? No, I don't.

Dr. Madden.—No? then I am out of it.

Witness.—I mean the line that continued the system from Prince's Bridge to Brighton, and from Richmond to Hawthorn.

You mean the Hobson's Bay Company's line? No.

Dr. Madden.—Then I give it up.

Witness.—It used to be called the Melbourne and Suburban line.

55. How long was it in operation before it went to limbo? I don't know that it did go to limbo. It had been running for six years, and I paid nine per cent. dividend.

55A. Then it was constructed and worked in much the same way as the Melbourne and Hobson's Bay line? Nearly the same.

56. Under a special Act of Parliament? Yes.

57. It had no power to get capital? No.

58. Then your business was to make odds and ends meet ; to keep working out of the capital you started with ? I don't know about that. I don't think I did.

59. Now was that so ?

Mr. Miller thought this irregular. They were shut out from producing the articles of association of the Main Line Railway Company : still more should his learned friend be shut out from examining the witness as to the articles of association of the Hobson's Bay Railway Company. They could not go into the particulars as to those articles.

His Honor.—This is cross-examination, and Dr. Madden is testing the witness now as to what his experience has been, and as to whether it has not been upon railways differently constituted to the present. It is open for him to test his experience, and he can go to any question he likes.

60. *Dr. Madden.*—I was asking you—seeing that under the Act of Parliament by which the line was constituted you had no power to borrow more capital—the result was that in the distribution of the money, if you wanted to buy new engines to keep going, you would take them out of revenue on the one hand so long as you could get a decent dividend for your shareholders ? Yes, that was so.

61. You cut your cloth, in fact, according to your measure ? Yes.

62. In South Australia you were Engineer-in-Chief to the Government ? Yes, I was.

63. They were Government railways ? They were.

64. The Government had merely to apply its administration to the means of the place ? Yes.

65. And you had to carry out that view ? Yes, from a financial point of view.

66. There was no check, no local interest you had to consider ?—you used your own best judgment in reference to the accounts there, and placed so much to revenue, so much to construction, and so forth ? No, no.

67. Then what principle controlled you ? Most of our lines were constructed from loans raised in England. The custom was to vote the sums required annually on the estimates. There was a construction account in the actual estimates, in which additions to stations and additional rolling stock and so on were charged annually.

68. As a matter of fact, whenever the Government contemplated raising a loan for a railway, your office was called upon for the estimates—is that so ? Yes, that is right.

69. Did you not include all rolling stock ? Yes.

70. And all new works ? Yes, till the opening of the line—till it was made.

70A. Therefore you were at pains in advising the Government to apply a general principle, and all in the nature of new works would go to capital account ? No, not always.

71. You always tried to keep to the rule of charging all that was new to construction ? Yes, that was done always.

72. Now, after the line was opened, suppose new works were wanted that were not in the nature of repairs, did you charge that to capital account ? I very often did. Usually we did, but a large portion of such charges we did not.

73. Oh, no doubt in all Government transactions there are exceptions. Now, rolling stock, *primâ facie*, would go to construction ? Yes, to equip the line.

74. You think if new engines were required to replace those wearing out, that would go to revenue ? Yes, to maintenance.

75. Then you suggest *à priori* an exquisite refinement—that though you do not get a new engine to replace an old one, you yet get one in anticipation of an old one wearing out, and that would be maintenance ? Yes.

76. Does that not convey the impression that probably all might wear out, and that then the new stock would replace the old ? Yes, that is so.

77. We all have our little day, you know—the new man comes in and we are missing ? Exactly.

78. Then, when you get old rolling stock replaced by new, and you have some rolling stock which is comparatively old but efficient, by your buying new can it be said that it was to take the place of the old stock when you buy it ? It might be so.

79. Now, take it how you like, where is your general rule now ? You say that new stock is to go to construction account : if that is so, then what is the meaning of your rule ? I never said that.

80. You said that all new stock that was not specially bought to replace old *primâ facie* went to construction account ? I said that in regard to equipping a new line.

81. Very good. If, when you have your new line equipped, you want to get say twenty other new engines to open up new traffic say, to what account would you put that ? I don't know how I might put it. That would be for an extension of the line.

82. No, not at all. You are going to run twenty more engines on some line. Take the Tasmanian Government. Say they want to set up a freezing establishment here to preserve beef and mutton ; that it is the interest of the landholders to kill the stock that is next to starving, and they want railway accommodation to carry the sheep from the grass that won't grow ; you want to make the best of that trade ; you buy twenty more new engines—how would you pay for them ? I should pay for them out of revenue, on the very principle I mentioned before—that if this traffic is coming to me, and is such as I anticipate, I should know my rolling stock would not carry me on, or that it would be worn out more quickly. I should then have to anticipate, and procure more stock.

Dr. Madden.—I don't follow you at all.

Witness.—You anticipate a sudden springing up of traffic, and you should know that the engines running could not comply with the wants of that traffic, and would wear out more quickly, therefore I would anticipate and purchase new engines.

83. And you would charge that to revenue ? I would, in anticipation.

84. And although the engines you have are not able to carry the new traffic, and you want new engines for the new traffic only, you would put that to revenue ? I should not put the engines on for any particular traffic, but use them indiscriminately. I would use them as best I could.

85. Suppose you were to blow them all up, would you charge them to revenue ? I should.

86. Well, now, suppose you were carrying on an ordinary parcels delivery, or the business of a common carrier; you had twenty draught horses, and suppose you start and get twenty more to carry on some new traffic, would they go to ordinary profit and loss account? Not to that particular year. I should distribute it.

87. You say you would distribute it over a number of years? Yes, according to the magnitude of the amount.

88. Don't you see that would wipe out your rule? No, I would charge it to revenue.

89. But you would charge it year by year? I would.

90. Then you would discharge the obligation about every fifteen years instead of point blank? As a matter of convenience.

91. Suppose the ordinary balance-sheet drawn, and you want to provide for wear and tear in the drays the horses use? I should write off so much each year.

92. Then you write it off out of capital: you create out of profits a sinking fund to add to capital? Yes, of course.

93. But the sinking fund would be treated as capital afterwards, that is so, obviously? It would be so as a fund; you don't practically add it to capital, you know.

94. Of course not; you write it down—that is nominally so, but in fact it is this, that you form a sinking fund and increase your capital by so much? Yes.

95. Then, that is the sense in which you speak on the circumstances of this case? Yes.

96. Well, now, come to this matter: you say that if new gatekeepers' lodges are replaced for the old gatekeepers' lodges, that would be chargeable to revenue? Renewals, practically.

97. But if they were new erections altogether they would be chargeable to capital or construction? I don't think I said that.

98. Yes, I will bring you to what you said: you mean that if they can be shown to be new they would go to construction account—do you say that if they are absolutely new buildings they don't go to construction account? It depends on the buildings; if the company is making a saving—

99. Suppose they are new buildings simply without any definition of the circumstances, would they go to construction account? Yes, to construction.

100. You say that if the Company wanted to keep their best men, and you assume they built some of these lodges and rented them to the men to induce them to stop—you say for that reason some of them would be chargeable to revenue? Yes.

101. I will put it in another way. Suppose that to induce people to travel, instead of leaving them to perch on a stump, or under a primeval gum-tree, you were to say we will give them a station. You put up the station for them; you do that to attract people who would not otherwise be induced to travel: would you put that to revenue account? It would go to construction; but that is not a parallel case.

102. If it was built to induce traffic that would not come to you otherwise, can you show me why it should not go to construction? It is not a parallel case. You are raising revenue by building the station.

103. Are you not saving money in the other case as to the rents? You are, in one way.

104. You say that building the station is to attract traffic, that is to earn revenue. In the other case, you give the men a house to live in, and you charge rent and get revenue. Where is the distinction? There is as much distinction as there would be were there no railway line. There are degrees of magnitude. Take the stations in Victoria: they are all of a different class throughout, and the meanest looking stations may have the largest traffic.

105. Oh, yes. You may have some people in one place free and easy going, satisfied with anything; in another you have a vigorous population, and one which would keep the Government going. That all affected traffic, but the real issue had nothing to do with it. You say the station is to attract traffic, and, in the other case, the lodges are to keep good men—where is the difference? The station is not to attract traffic; they would have the station to fit the existing traffic.

106. Do you say there are not many places in South Australia where there is only a siding—a road-side station? Plenty.

107. And where anyone coming must stand shivering in the rain, as there is no station provided? Yes.

108. Suppose you come there and build a station for them. You want to attract people to travel; you build the station, and you put that to construction account? Yes.

109. On the other hand, you build huts to attract the working men. You want to charge them rent, and you raise revenue by that means? Yes; but you could not carry on the line without having some kind of stations.

110. Perhaps not to advantage. Suppose you had a man who did not think he was properly housed, and who was not happy, it would only be a question of a shilling a day more wages, and you would get them, instead of that you put up huts for them? That is so.

111. Then don't you consider—say, if you pay off the cost of the huts in fifty years at 5 per cent. annual charge, that is, for rent, when you pay that off would you not carry that part of the earning, that rent, to construction account? No, I don't think I should.

112. *Dr. Madden.*—Then I give you up. I will now take you another way. Every man is, of course, entitled to his opinion. You were connected with the railways in South Australia. Was there ever a platelayer's cottage in South Australia not charged to construction account? There were hundreds.

113. What was the general practice? To charge to construction.

114. I am told by the present incumbent of your office in South Australia that—

Mr. Miller objected.

His Honor.—In cross-examination, Mr. Miller.

Mr. Miller.—In cross-examination he cannot introduce a fact not in evidence, or that he intends to put in evidence, that is, he cannot introduce it as a proved matter.

Dr. Madden.—I cannot shoot my witness into the box as you might do, Mr. Miller, while this witness is there.

His Honor.—In cross-examination you are entitled to say so and so is a fact, as well as going to the proof.

Mr. Miller.—It is impossible to contradict hearsay testimony, and they could not introduce a fact that was not in evidence, or to be put in evidence.

114A. *Dr. Madden.*—I am instructed that Mr. Smith, Chairman of the Railway Commissioners of South Australia, will state that in no single instance has any one of these platelayer's cottages in South Australia been charged otherwise than to construction account. Will you contradict him? I will.

115. Can you tell me of any platelayers' cottages in South Australia that were charged otherwise than to construction account? Yes, yes, long before Mr. Smith came there. I will venture to say that for many years the cottages that existed all the way from Adelaide to Kapunda were all charged to revenue.

116. Will you tell me the period? Before my time, from 1867, perhaps, to 1874—it was somewhere about that time. Then I began to build the cottages on a different principle. The cottages in those days were detached; now they are in groups.

117. Will you tell me the period? I have told you approximately—it was about 1874.

118. Ever since 1874, then, they have been built and charged to the construction account? I think so. I know that in 1874 there was no special loan account.

119. Do I understand you rightly: is a loan account synonymous with a construction account? Yes.

120. During the time you speak of there was no construction account? Oh yes, all the cottages that were built since 1874 have been built from a construction account specially voted for that particular item, and in every estimate that has been furnished for the construction of railways, perhaps from 1877 or 1878, it has formed an absolute item of the original estimate. It was the practice between 1874 and 1877 or 1878, that when a loan bill was passed there would be a line so many thousands of pounds for so many cottages; but prior to that date, and prior to the first loan being taken in that way, all these buildings were paid for out of revenue.

121. Prior to 1874 the bulk sum was voted? No. It was done in this way: most of these cottages were built by the platelayers themselves.

122. Then what was done in those times was this: the Government supplied the materials, and the platelayers supplied their labour, for their own advantage? Not in all cases; there were exceptions.

123. Was that the case as a general rule? In some instances.

124. And it was found convenient to place this to the revenue account? Yes.

125. Taking the other items in dispute, look at No. 2—"Building the covering and chimney stack for exchange locomotive shop." That is absolutely new, made of different materials, and built in a different place. Do you say that can in any sense be treated as a renewal? It is not a repair; it is not a substitution. I understand it is a substitution.

126. No, it is in a different place, and is a building not in existence before? Yes, that is right.

127. Why is it not construction on your own account? I am told there was an old building—are we to suppose that because it chances that a new building was added to an old one, it makes any difference? Oh no, that will make no difference; it will remain a construction charge.

128. If it was placed in a different position to cover a different engine, would you say it was a new building—in that sense would it be chargeable to construction? That is another matter altogether; I understand that this was a replacement of something that existed before—that it was to do the work of the old machinery. I understand that there was an old engine and boiler working.

129. A new foundation was built, a new engine placed upon it, a new building constructed over that, and a new chimney stack, and when that was done the old one was cleared away: what would you term that? I should say it is a replacement of the old one.

130. You think that, notwithstanding the different position, the different character, and the different area, it was a mere replacement? It had the same use as the previous one. There must have been a chimney stack.

131. Supposing we were valuing the assets of this Company and an arbitrator comes along, and seeing the old engine values it at £5 and the new one at £350. Do you think that it is just the same thing, and that it is merely a replacement? It is an exactly parallel case; you take out the old one and put in a new and better one.

132. Now look at No. 1, Hobart—Erection and fitting up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop, £346 8*s.* 2*d.* You say you have seen that? Yes; I saw it yesterday.

132A. Critically? Yes.

133. Do you treat that as an alteration also? To a great extent the alterations and fittings have been mere fittings taken from old stock.

134. How do you know that? I was told so.

134A. We have been told by a man who saw it done that the old material was 300 feet of pine shelving taken from the old carpenters' shop for the store. If that is so, would you charge that shelving to the construction account? Oh, that is too trifling to take into consideration. But my informant was the very person who gave that evidence.

135. Supposing that about 300 feet of shelving, some American lumber, and in addition to that some trifle of hardwood that was lying about the place, and some old packing cases, were used: would you consider them to be treated as a charge to the construction account? I would not trouble about such trifles.

136. If these trifles were put into the building would you open an account for the wood against revenue and charge the rest to construction? I can hardly think that can be so.

137. *Re-examined by Mr. Miller.*—As to this first item, as a matter of principle, if these packing-boards were used in fitting up the store, and had to be charged to some fund, what would you do? You must charge it to revenue if you were bound to make a charge for so small a thing. But I do not know that I would trouble about it.

138. That is, as a matter of convenience? Yes.

139. As a matter of principle you would charge it to revenue? Yes.

140. You had an opportunity of exercising your judgment as to the nature and extent of these alterations? Yes.

141. In your opinion was there a substantial charge to be made to some fund with respect to them? Yes, I think so.

142. And that would be to revenue? Yes.

143. Erection and filling up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop: would that form the subject of a substantial charge to revenue? Yes, as far as I can say. I cannot vouch for what the alteration is; I can only tell as to what I was shown.

144. From your experience could you exercise your judgment as to the probability of what you were told? I do not think I can.

145. That was simply upon information? Yes.

146. You adhere to the answer you gave to my learned friend's hypothesis, now I will give you hypothesis No. 2—Suppose "the portable engine originally supplied for the workshops being so much worn as to require very costly repairs, and, moreover, not being powerful enough to work all the machinery at one time, the growing necessities of the railway required the use of a more powerful boiler. This again compelled the erection of a building to cover it, and of a chimney-stack to give the draught; while, for the sake of economy, the boiler had to be permanently seated. The effect has been that"—

Dr. Madden.—What is this?

Mr. Miller.—It is an hypothesis; you have stated yours, now I am stating mine.

Dr. Madden.—I intimated something that I can and will bring against him; but my learned friend is now reading something that someone or other has given him, and which cannot legally, and will not be allowed to be put in as evidence.

His Honor.—He is saying, suppose I prove so and so, what would you say then?

Dr. Madden.—Very good.

147. *Mr. Miller (proceeding).*—The effect has been that, with twice the power in the engine, the consumption of coal and water is very greatly reduced, and a large annual saving will be effected with increased efficiency for doing the ever-expanding work. The engine purchased was an old one, and it cost less than the sum obtained for the engine it replaced. I ask you, then, could you call that a substitution? I think so.

His Honor.—That is a very leading question. Surely you could put it in a much more simple way.

Mr. Miller.—We have here the substitution of an engine that is made a present to us.

Witness.—Both the engine and the boiler.

148. *Mr. Miller.*—Suppose that has to do the work of an old boiler, and the new one requires these changes, would you call that substitution? You cannot do without this chimney for the engine and boiler.

149. Would they, then, form replacements? Yes, I think so.

150. And go to revenue? Yes.

151. With regard to the rolling stock, notwithstanding my learned friend's cross-examination do you still adhere to the answer originally given by you as to what portion should be charged to revenue? Yes.

152. To get it in one, or to charge it over several years would be a mere matter of convenience? Yes.

153. It would not affect the principle? No. It is done by the London and North-Western Railway Company repeatedly.

154. The purchases of that sort would have to be made at a distance? Yes; in advance—in anticipation.

155. Would you require to keep these engines in stock to meet possible contingencies? Yes. Supposing you equip a line with a certain number of engines; in a year or so some of them get disabled; but you cannot do without the same number; you anticipate and make provision for those to be laid up.

156. Would you not have to take the risk of casualties? Yes, of accidents.

157. Do you say, then, that the provision of this additional stock would be part of the annual maintenance and working of the line? I think so.

158. As exercised by a prudent manager? Yes.

159. Talking of the cost of the gatekeepers' huts, my learned friend gave you an hypothesis that the men might lie under a hedge or a gum-tree, and another shilling or two would induce them to face these inconveniences; but supposing these men had wives, and it was not possible to get them without these huts; supposing, as a fact, that while you only gave the men wages their wives kept the gates, then, considering the annual cost and the annual safety, would they be an absolute necessity? Yes.

160. And a matter of economy? Yes.

161. *Re-examined by Dr. Madden.*—Upon this point, "the alteration of original store to form continuation of carpenters' shop," have you any idea as to what the original condition of that building was? I could say what the building was; I could not tell you what the internal fittings were.

162. I am told it is about the size of this room (the Court)? Yes.

163. Cut into three—a door between each room? Yes.

164. As soon as they built the new building they took the stores from the centre compartment of the old building and put them into the new one: what alteration did they make—did they simply place these at the disposal of the carpenter? I am not quite sure whether any alteration was made.

165. In the Acts and Proceedings of the Parliament of South Australia I find under the general head of works of construction a return sent in by you, in which appears "Verandah to cottage No. 3"—this was charged to the construction account in your own time? I never swore anything to the contrary.

166. And again, there were other works, such as alterations to suit Victorian stock—they wanted to keep them away by themselves; then there were additions to new cottages—all charged to construction account? Yes.

167. Since 1874? Yes.

167A. As I understand you, then this was in your own time and your own act? Yes, and prior to that time my own act also.

168. Was not the real history of the change in the system of accounts the business of the Government who compelled you to keep real accounts: was not the system of accounts insisted upon by the Government? No, by me.

169. And in accordance with the system in England and other railway countries? Yes.

170. *His Honor.*—You are possibly acquainted with the system in England and throughout the United Kingdom, where the law is that certain accounts shall be furnished to the Board of Trade yearly: have you ever seen an Act of Parliament and the schedule, and in that schedule only new rolling stock placed in the capital account? Yes.

171. And therefore throughout the United Kingdom new rolling stock is charged against capital? Yes, if it has money.

172. If a company has no capital I presume it will take money from any source where it can get it? Yes. I can cite a case where a flourishing company have taken their surplus to buy new stock.

Mr. Miller said it was a bad usage, and would not be applicable to this colony.

Witness.—There was nothing to prevent a company in England from increasing its stock in that way. They could not pay dividends out of capital, and instead of paying dividends from the profits they were distributed in the purchase of new stock.

173. *His Honor.*—A company has to do repairs, and as traffic increases with more rolling stock I presume repairs increase; more tools are required to make these repairs; more men would be required to use these tools; more bench room would be necessary, and extra covering would be required, because the men could not be put to work in the open: if in order to carry out these repairs a new building is erected, would you put that down to capital? Yes.

174. In this case you have a building about the size of this Court. At one end there is a smithy, in the centre a store, and at the other end there is a carpenters' shop. That carpenter's shop requires enlarging for the purposes I have mentioned to meet increasing exigencies caused by increasing traffic. Suppose instead of enlarging that carpenters' shop it is thought better to utilise the store, and put up a new store? In that view it would come out of revenue.

PRICE WILLIAMS, *Civil Engineer, called in and examined by Mr.* FOOKS.

1. What is your name? Price Williams.

2. What are you? I am a Civil Engineer.

3. Have you also had experience as a mechanical engineer? I have. I have served my apprenticeship and worked as a locomotive engineer.

4. Have you practised as a consulting engineer? Yes.

5. And as consulting engineer you have had to do with questions of construction, working, and maintenance of railways? Yes.

6. You have had experience with the wear and tear and deterioration of railways and everything connected with the rolling stock? Yes, I have made this a special study.

7. Where did you gain your experience in these capacities? With regard to the permanent way, I was resident engineer of the Great Northern Railway, assistant engineer on the Lancaster and Carlisle Railway, and also on the Taffe Vale Railway, where I was the assistant of the general manager.

8. You are well aware of the necessities and the expenses that are from time to time required for what is called maintaining, repairing, aud renewing a railway? Yes.

9. And I suppose you cannot maintain and keep in repair a railway for many years without some works of construction? "Construction" has, of course, two meanings. There is construction as regards the primary construction of a line, and construction as regards its equipment after it is open for traffic—that is, progressive construction to meet the requirements of growing traffic. There is a distinction between the two words.

10. Have you had experience, as Manager, in the system of railway accounts? Not as Manager, but it happens, as all my professional brethren know, that I have made the subject of railway statistics a special study, and in addition to that I am an accountant in every sense of the word. I am familiar with the mode of keeping railway accounts of every kind in the old country, and I have studied very carefully the accounts of this Company.

11. You are acquainted with railway management generally? Yes.

12. Have you had experience out of England in regard to railways? Yes, in Ireland, for instance, I had considerable experience, and by visiting New Zealand, where they have the same gauge as they have here.

13. Can you tell me, with regard to replacements and improvements, when they are made in substitution for something that existed before, whether you would put them down to "progressive construction" or not? I certainly would put them down to progressive construction. Of course, as one witness has already stated, the practice varies, and there is no rule at all; some Companies put down everything to capita For instance, the London and North-Western Railway Company—the premier railway in England—they draw the line at extensions. I can show that they distinctly draw the line as regards any extensions or additions to rolling stock in the ordinary sense that would not be charged to capital. It would be charged to capital in regard to new rolling stock for the purpose of making traffic, or for the development of a particular traffic. The traffic is not growing as rapidly in the old country, I am sorry to say, as it is on this particular railway. It is increasing here at the rate of 4 per cent., and I should be glad to see additional stock.

Dr. Madden.—This seems rather in the form of a lecture than evidence.

Mr. Fooks.—That is going rather from the question; give us concise answers.

Witness.—All additional rolling stock is provided from revenue.

14. As to the general rule? There is none. The practice differs on different lines.

15. Now, from your experience do you know any Railway Company in England—you, of course, know the contract and the questions at issue in this case, and you know the Railway Act and the Main Line Railway Amendment Act—have you ever known in your experience any Act of Parliament under which any Railway Company had put upon it the obligation to construct, maintain, and work a railway in England? No, I am not aware of a single instance.

16. No obligation to work—they are presumed to work, of course? They are, but not compelled.

17. *His Honor.*—Did you never know of any agreement to construct, maintain, and work a railway? *Witness.*—No. Under the Maintenance Clauses of the Act of Parliament the Company would have to do certain things; they are bound, in fact, to make a deposit when they go to make a new line.

18. *Mr. Fooks continues examination.*—Do you know of any Railway Company in England where the subscribers or shareholders are under the obligation to construct, maintain, and work the line and keep it at all times supplied with rolling stock? No, I do not; the Companies are bound to construct but not to work.

19. Where do you find that they are bound to construct? They are bound to construct.

Dr. Madden.—Why this is like a speech day at a school.

His Honor.—The witness has already said he knows of no case where the Company was compelled to work the line.

Witness.—There is no power to compel them to work and maintain, and for all time.

Mr. Fooks continues examination.—You know that under the Lands Clauses Consolidation Act under which these companies are all incorporated, there are two branches—construction of the line and powers of maintenance. The Act requires—

Dr. Madden.—I object. This is a proposition as to what would happen under the Lands Clauses Consolidation Act in England, and is certainly not evidence. In no particular can it be relevant to the issue, and, if not relevant, it can't be evidence.

Mr. Fooks.—If I understand the Act of Parliament here is very nearly the same as in England, at all events you have a knowledge of the Act to which I refer—I am now speaking to a gentleman who is as conversant with railway management as any one in England, and I ask his experience. These are leading features in the case, and I ask is he aware of them?

His Honor.—We are all assumed to know the law, although we do not always know it. You ask this question as a leading feature of the case, but you can refer to those Acts without giving evidence of them.

Mr. Fooks.—I wanted to know if he had a knowledge of them.

His Honor.—He says he has, and no doubt he has as much knowledge as most of us.

20. *Mr. Fooks continues examination.*—Have you known an instance of any Company formed to construct a railway having a subsidy or guarantee of interest on the capital expended in the working? I have never known a parallel case to this at all.

21. Have you known of any instance of a Company put under the obligation of maintaining and working a railway, the other parties to the agreement being participators in the profits of the undertaking? No, I know of no parallel case.

22. Then you are aware of the contract in this case, and you believe that it is *sui generis*, and not covered by any experience you have? Yes.

23. You have been in Court while the case was going on? Yes.

24. There are certain items of expenditure objected to as not being management or working expenses. I will not bother you about working capital. There seems to have been a little confusion in regard to the words construction and capital. I want to guard against that, and show what the meaning of the term capital is, and what may be employed in construction in its ordinary sense, or in maintenance. I want you to tell us which of these items, in your experience, should, properly speaking, go to repairs and maintenance, and what to construction. Maintenance, of course, would include some construction. Take time to consider. I don't know if you have the papers. [Witness: Yes, I have got them.] Take the first thing—Hobart, erection and fitting up internally of store in Hobart yard, and alteration of original store and carpenters' shop—must not every railway, properly equipped, to be in good and efficient working condition, have a store? Necessarily so.

25. For the protection of goods and so forth? Necessarily so.

26. And a carpenters' shop, with a supply of working tools? Yes.

27. All parts must be perfect, and the line supplied with tools and necessary appliances for effecting repairs or any works connected with the construction and working of the railway? Certainly.

28. It is usual and necessary that these should exist? Yes, on every well-equipped railway.

29. Now then, suppose they existed, they would from time to time be altered and adapted to any altered conditions of the railway? Yes; difference of construction in any particular might render new appliances necessary. The alteration in the size of a driving-wheel, for instance, might necessitate the purchase of a new machine.

30. Then, if a general alteration of the circumstances of the railway was made, you might want all new tools and appliances? Necessarily so.

30A. Take the building of this store: what is it for?—is it not to protect the stores; and the fittings, is that not to have them so that they can be conveniently arranged and classified? That is the main object.

31. If such a store was insufficient for its purpose, or not adapted to the wants of the railway from its position, you would put it elsewhere on a more convenient site, or build a new one? That is so; it would be done on all well conducted railways.

32. Now, would you put the cost of that down to maintenance and repairs, or to continuous construction—I mean to progressive construction or to original construction? If it was a necessary expenditure it would be charged to maintenance and working, that is, if necessary, to the proper working of the undertaking.

33. It is an old store to form a carpenters' shop. You have seen the shop? Yes, I have seen it; and I consider the replacement was judicious, economical, and necessary.

34. Is there any useless work or extravagant work shown in the shop as you saw it? None. I should have liked to have seen a little more.

35. There is nothing ornamental about it? Nothing.

36. Only that which is absolutely necessary to the maintenance and working of the railway? Nothing but what was essentially necessary.

36A. Now take the next item—Building the covering and chimney stack for exchange locomotive shop, engine, and Cornish boiler, and preparing site for removal of brass furnace: can you tell the jury and His Honor what is the average life of an engine? You can tell the length of life of an engine and boiler in all particulars? I can.

37. You can tell the cost of renewing the various parts of engines?—some parts, of course, wear out much more rapidly than others? Yes, they do.

38. Then taking all that into consideration, from your experience what is the average life of an engine? Do you speak of a stationary engine?

39. Yes, what is the life of that? I can't tell off-hand. That engine might have a very small life. I have not seen the engine which was removed. I have not seen it, but no doubt it would not have been removed until its life-time was nearly spent.

Dr. Madden.—What does that matter? The old engine is paid for—they have been allowed for it.

40. *Mr. Fooks* (to witness.)—What is the life of an engine?

His Honor.—The life of a fixed engine would vary, the life of a locomotive engine would also vary.

Mr. Fooks.—He can tell from his experience what the average life of these engines are.

His Honor.—He has had no experience of these engines.

Mr. Fooks.—No, but of engines generally.

His Honor.—Oh, all over the world; but we want the life of these particular engines.

41. *Mr. Fooks.*—I will not press it—every one knows that they must wear out. I will assume that they do wear out. (To witness.)—Now, is it not good economy to have such an engine housed and covered in? It is necessary. I gather from the state of the works that it was necessary to cover the engine in. It was necessary that they should have a better engine properly housed. The old engine only had an iron chimney; the new one now has a brick stack, and I consider, in my judgment, as a mechanical engineer, this work was proper and necessary in point of carrying on the existing and growing traffic. Under these circumstaces it should be paid for out of revenue.

42. Preparing site for removal of brass furnace. This chimney stack was necessary for that furnace? It was necessary to carry away the smoke which formerly went through the old store, and it served for the brass furnace besides. It was a necessity.

43. Was the brass furnace a necessity? Yes, I am glad to see they are able to do their own work.

44. I suppose the shop generally is necessary for the repair of rolling stock and other things, where work is wanted constructed of brass and iron. Every well-conducted railway should have these things? Yes, and I should have been glad to have seen much larger works.

45. It was a necessity? It was. In my opinion it is necessary for efficiency and economy in the management of the railway.

45A. Did you see the porch in front of the station to keep vehicles from the front door? Yes. It is merely a cast iron frame or covering to protect passengers from the weather.

46. Don't you think that in giving proper station accommodation it is a very desirable part of station accommodation that passengers should be protected from the inclemency of the weather? It is usual in our country.

47. If you found something of the kind was wanted, it would be added to the station as required? Yes.

48. Would you put such an item down to maintenance and working, to construction, or how would you charge it? I should put it to maintenance. We never put anything to capital on the Great Northern Railway under £100.

49. As a result of your experience, do you consider this porch a necessary thing for the proper station accommodation of passengers? I do.

50. I will now go the gatekeepers' lodges. I suppose, or do you consider, that the gatekeepers are necessary to open and shut gates at the different points along the railway? Well, when the line was originally constructed, and when it had only two trains a day, it might not have been so necessary for the safety of passengers; but when, as is now the fact, the trains are increased to twenty-two trains a day, I consider the gatekeepers a necessity to the line, for safety in working. No doubt it is essential.

51. It would be a matter of growth. As the number of trains increased the necessity for gatekeepers would arise, and the necessity had also arisen for houses for the gatekeepers? Yes, I consider them all necessary.

52. Then, after original construction had been ended, would you put the cost of those houses down to continuous construction or to maintenance and working? I should put it down to progressive construction, consequent on the growth of traffic.

53. From economy and convenience? Yes, from economy and convenience.

53A. You have not gone over the line? I have not.

54. Would it make any difference in your mind if, when the Company took over this line from the contractors, some of these huts were on it, as to whether they belonged to construction or not? Not a bit.

55. Suppose they were the huts built by the contractors that had been taken over, they would be the Company's property? Quite so.

56. They would be the Company's property—whether they were new or to replace the huts built by the contractors—it would not make a difference in the account? Not the slightest.

57. You have been conversant with the management of railways and the construction of Railway Acts; you have had to do with them; you know the difference between capital and revenue; you know what a profit and loss account is; and you know the items that come generally under the heads of traffic revenue, of construction account, and under the heads of maintenance and working? Yes.

58. Now, in your mind, and according to your experience, how would you bring these items to the account ultimately, so that they might be properly shown in the accounts. They might first go to maintenance and working, and then they might afterwards go to revenue or capital?

Dr. Madden.—That would not be evidence. The question was, how would they be put amongst railway men.

Mr. Fooks.—That is what I say. According to your experience as a railway man, how would they be

placed in the accounts ultimately? Certainly to revenue, as a necessary expenditure. They must, of course, go to an interim account, one against the other, but they would have to keep up all the headings of that account till the time comes for arriving at profit and loss.

59. *His Honor.*—Do you refer to the lodges when you say they would be charged ultimately to revenue? Yes, the lodges.

60. *Mr. Fooks.*—As a general practice, I ask your experience as between capital and revenue. You say the whole would go to revenue? Yes.

61. The whole of them?—if you have any hesitation about it, please say so. Suppose they had to be divided? I make no distinction in this case as to one part being charged to capital, another to revenue. All of it is necessary expenditure, and necessarily should be charged to revenue. I should be glad of a list of the items referred to.

62. *Mr. Fooks.*—You have it. Of course you know as to the cost of managing such an undertaking—Directors' salaries, and so on. Now, there is an item objected to, Trustees' remuneration, voted at general meeting, £472 10*s*. I don't know what these Trustees are for, but no doubt some purpose connected with the railway.

Dr. Madden.—I must object to this.

63. *Mr. Fooks.*—I assume that the Trustees are necessary to the management of the undertaking. Is it a revenue charge, or how would you put it? It is obviously a part of the general charges. It would go to the working expenses of the railway.

64. *Cross-examined by Dr. Madden.*—I believe, Mr. Williams— My name is not Williams, Sir.

64½. Oh! Mr. Price-Williams—I beg your pardon. I believe you are known as a theorist among theorists on railway matters in England? I never heard the term as having been applied to me. Were it so I should have known of it most likely.

65. Well, I have heard it of you. You have now come to the southern hemisphere to make acquaintance with us and enlighten our darkness, and you have come in the train of our friend, Mr. Fooks? I came with him in a steamer. I don't know whether you would call that a train.

66. You came as a witness, specially imported, I believe? No. I appeal to His Honor as to whether I said anything about being specially important. I trust I shall be addressed as a gentleman here.

Dr. Madden.—Don't be offended, but consider, you know. I want to know all about you, because I am going to tell the jury about it, and I want it in evidence.

Mr. Miller asked Dr. Madden to be more deliberate with the witness, as he could not follow him so quickly.

67. *Dr. Madden.*—Well, now, Mr. Price-Williams, I believe that you left England for the purpose of being a witness in this case? I did.

68. Sent here by the Company, with your friend, Mr. Fooks, as a representative railway man? I was.

69. Were you connected with any railway system in England, or are you engaged in the management of any one railway in England at the present time? Yes, I am now a consulting railway engineer of many years' standing.

70. You said you were Manager of the Taff Valley Railway Company? I said nothing of the kind.

71. Well, then, what did you say? I said I was assistant on that railway, and had been engaged in the manager's office.

72. Can you tell us what you really did do? I was an assistant engineer to the general manager.

73. How long ago—what year of grace was that in? About 1854.

74. And since then you have never been in connection with the administration of any railway? Intimately connected.

75. I mean the working administration? As consulting engineer on a railway.

76. Well, in England, where, I believe, work and responsibility is divided into many subdivisions, I understand you were known as a promoters' engineer? I don't understand the meaning of the term.

77. In England have they not a term "promoters' engineer," with a signification well defined amongst railway people? No.

78. Now, are not you engaged in promoting companies? Not excepting as consulting engineer.

79. Have you not been largely engaged in floating companies? No; I am an engineer, and have nothing to do with floating companies, excepting as such.

80. Well, you are an engineer of those who float companies? Yes, I act for those who float companies.

81. Are you now personally connected with the administration of railways? I have told you not since 1861.

82. As I understand you, every one of the claims which are made in this account should go ultimately to revenue account? I consider so.

83. In that respect, you are conscious and aware that you differ from all the witnesses who have been called on your side? I am aware of it to a certain extent.

83A. Now, in addition to coming out as a witness, have you held any office under this Company? No, not in the least.

84. You are a shareholder? No; fortunately I can say I am not.

85. Well, that may be a matter for congratulation. Now I understand the reason you think all those items should be charged to revenue is that you have a new subdivision of accounts. You have original construction and progressive construction? That is not a new idea, nor is it one of my own; it is shared by others.

86. It is shared by others. Well, it would not be much of an idea if you could get no one else to share it. Then you would carry these gatekeepers' huts and shops and everything to progressive construction account? Yes, to continued construction account.

87. I say you would carry them all to progressive construction account? Yes.

88. To construction account? I have already told you. I appeal to the Judge.

His Honor.—The question is a fair one, and requires an answer ; take your deliberate time to each answer.

89. *Dr. Madden.*—Now let us make a fresh start, and forget the past. I think you said you had some views which you share with others regarding the difference between construction and progressive construction. These items, such as gatekeepers' lodges, alterations to stores, &c., you would charge to progressive construction account? I would charge them to working expenses—to ordinary expenditure.

90. Am I right in presuming to believe that you said you would charge them to progressive construction account? Yes.

91. Then you would charge them to a construction account of some kind? I consider the whole of these charges are properly maintenance ; maintenance and construction have, in that sense, one meaning.

92. Do I understand you to say and to swear that? Excuse me ; I am not accustomed to be treated in this Old Bailey fashion and reminded that I have been sworn.

His Honor.—Oh, don't take offence: take it quietly.

93. *Dr. Madden.*—Now, Mr. Price Williams, let us be friends, and make another fresh start. As a matter of fact (and I assure you I did not for a moment assume that you would not, according to your lights, tell the truth, at least for the present, any way)—as a matter of fact, was I right in coming to the conclusion that you draw a distinction between construction and maintenance in its ordinary sense, and progressive construction and maintenance, or do you say maintenance and construction is the same thing?

Mr. Miller.—We are cumbering the ground with very fine distinctions.

Witness.—That is not an apposite explanation of the distinction. To my mind, as an engineer having large experience, there is really no distinction, when a line is started, between maintenance and renewals or progressive construction.

94. Then you will father that idea which you say you share with some others? I can only tell you that the Institute to which I belong were good enough to give me their gold medal for calling attention to that very thing, and proving it.

95. I am glad to hear that. This also you consider an important thing—a grand consideration in the management of the railways of the future, that the rotation of the earth on its own axis should be provided for. Have you not asserted that? If any one has told you that, Sir, he has perpetrated a practical joke upon you that you should resent.

96. Oh, then you did not say that? I am really sorry for you, Sir. I think they have been taking a rise out of you.

97. *Dr. Madden.*—I am glad you are sorry for me, although I regret that during your visit to this happy land I should have said anything which might be productive of sorrow to yourself.

Witness.—Oh, I take all that as a joke.

98. *Dr. Madden.*—Then you differ altogether on this subject from these other gentlemen who have been called on your side? No, there is not much difference. It has been shown that all agree to charge these items either to capital or revenue. There is no law for it. The practice varies in England, and I presume it does out here, but practically there is no difference.

99. You said you did not know of any Company which had contracted to construct, maintain, and work a railway under a guarantee of interest from other persons? Yes. No Company who were compelled to maintain and work the railway not for thirty years, but in perpetuity.

100. Then you know of no instance at all? No. I may mention that I had to investigate the circumstances of all the railways in Ireland, with a view to their purchase, and in the whole of the Irish railways I never met a single instance.

101. *Dr. Madden.*—Well, Ireland is a bad place to go at the present time for instances of any kind. And in England do you know of any lines belonging to private companies, working with similar features to this Main Line, that is working under guaranteed interest? That is very common, it is a different thing. I know of instances of that kind, but they do not apply.

102. Do you know of any direct instances? Yes, I could point out to you branches on the Great Northern Line that were guaranteed interest for years. They have branches constructed in that way, but not working under a contract that they shall be maintained.

103. *Re-examined by Mr Fooks.*—I desire to ask you a question about the rolling stock. You are aware of the conditions affecting the wear and tear of rolling stock? There comes to be a period when it is considered economical to dispense with the old, and buy new.

Dr. Madden.—Surely that does not arise out of my cross-examination. The only rolling stock I mentioned was the rotation of the earth on its axis.

His Honor.—The question may be put by permission.

Mr. Fooks continues examination.—There comes to be a time when under proper economical management, when the rolling stock, engines, trucks, and carriages, instead of being repaired, are consigned to the scrap heap, and they get new ones instead? Yes. May I explain. Each class of rolling stock has its life values. Our arrangement is the same as ordinary life values. If you run an engine to death, or to extremity, its life value is reduced to half the time, and if the management is tempted to distress an engine, or run it beyond a certain number of miles, it is more liable to fracture or damage some of its parts—the iron becomes crystallised. It is quite an axiom in England that the working parts of an engine are worn out in the short period of ten years—I mean that the life of an engine is ten years. I am bound to say that I am very sorry to see that Mr. Grant—who has done all that he can to carry on the Railway efficiently and economically—his engines are simply overtaxed.

His Honor.—Now I think we are going beyond the limits of evidence.

104. *Mr. Fooks.*—I was going to evidence respecting engines. An engine is only calculated to run a certain number of miles' continuous running? *Witness.*—Yes, you distress and abuse your engine if you do more.

105. What effect has it on the structure of the iron? It is to render it excessively brittle, and to enhance the cost of its upholding and renewal, and it is dangerous to the life of the engine. Our experience is that an engine should be from a third to a half of the 365 days of the year at rest. If you exceed that

you do an injury to it, and of course to your own cost, and you largely exceed the normal cost for engines and rolling stock.

106. Have you seen the rolling stock of this line? I have seen some of it, and I am surprised that out of the bare stock of fourteen engines two only are in hospital. There should be from a third to a half at least in hospital. Every locomotive man will tell you that you should have at least from a third to a half under various classes of repair.

107. It is because of the general exigencies of the traffic that they are worked to death? I presume so. Another feature is that you should increase the calibre of your engines. In the first year of working you had ten-inch cylinders, you have increased now to fourteen inches. It means extra cost, but it means increased efficiency.

108. Have they got as many engines as they want now? They have not got half enough. The measure of the necessity of engines is the return of the number of train miles of the engines. We know as an accepted fact that with a certain train mileage you want so many engines.

109. Then, they are not over provided with rolling stock? They are very much under provided, both with engines and carriages.

The Court adjourned until 2·30 o'clock.

Afternoon Sitting.

Mr. Fooks.—The examination of the next witness, Mr. Grant, will, as far as I can see, conclude our witnesses, and our case. If anything transpires we may call other witnesses, but that depends upon the other side. There is another thing I desire to mention, and that is that I can conceive, I was going to say, disappointment that I am leading in this case, and taken the wind out of my learned junior's sails. I desire that Your Honor may allow two counsel to address the Court, if it can be done; and I desire this all the more because there has been a little dispute.

His Honor.—I have never heard of such a thing being done.

Dr. Madden.—The Common Law Procedure Act forbids it.

Mr. Fooks.—I do not contemplate this being done, but it may be when it comes to reply that I shall desire it. I have been led to suppose that an exception would be probably made in this case, and that Your Honor would accede to it.

Mr. Miller.—I wish Your Honor to understand that I am no party in any way to that application.

CHARLES HENRY GRANT, *Civil Engineer, called in and examined.*

1. *By Mr Fooks.*—You are by profession a Civil Engineer? I am.

2. You also hold the position, as I understand, of Manager of this railway undertaking? I do.

3. You have held it for several years? Yes, for many years.

4. Will you tell us what experience you had in England before you came here with reference to railway management and railway construction? I was Consulting Engineer for many years in the office of Robert Stephenson. I have constructed railways in America, and came to Tasmania under the appointment of the Directors.

5. I understand you came over here while the railway was in course of construction, or before it was constructed by Clark, Punchard, and Reeve, under the conditions of the contract between them and the Company? Yes; I came here to represent the Company to see that the conditions of the contract were fulfilled.

5. It was your business to see that what they contracted to do was done: can you tell me the sum of money expended in construction? Upwards of £700,000 was certified to by the Colonial Auditor.

7. But do you know what sum of money was expended in the construction of the railway? I know I came out to carry out a contract involving an expenditure of over £1,050,000. I don't know how the accounts were adjusted.

8. I want you to speak from your own knowledge? The sum of £100,000 was raised after the completion of the line, and expended on the undertaking.

8A. In construction? Yes, in construction, and various other matters; but I did not have the adjustment of the accounts.

9. Of course you have a knowledge of the Tasmanian Main Line Railway Act, and all the amending Acts, and also of what is called the Disputes Settlement Act? Yes.

10. And you are familiar with the Act that was passed to give effect to the opinion of Sir John Holkar, Mr. Judah Phillip Benjamin, and Mr. Cyril Dodd? Yes.

11. Did you furnish to the Government quarterly abstracts of receipts and expenditure, quarter by quarter, so far as they could be made up in this colony? I did.

12. And I believe you continue to do so up to the present time? Yes.

13. Has there been any objection raised up to the present time as to the form of these accounts, and as to the mode in which they have been rendered? None whatever.

14. Prior to the Disputes Settlement Act had any question been raised as to any items of expenditure contained in these accounts as being wrongly included? I don't remember a single item.

15. Was any objection raised on behalf of the Government a year after the Disputes Settlement Act? No; no objection has ever been raised to the items up to this present time.

16. Was there any objection made till the year 1883? None whatever till 1884.

17. I think that when these objections were made it led to some correspondence with the Colonial Auditor? Yes.

18. Were these accounts checked and audited on behalf of the Government? Regularly so.

19. Did you offer all facilities for doing so? Yes.

20. You gave them access to the accounts, and all the information they required? Yes.

His Honor.—There is no question as to this.

21. *Mr. Fooks.*—As we have got a number of items objected to, we will at once come to the nature of these items—you know what they are? Yes.

22. Are any of these items expenditure other than that for working and maintaining the railway in good and efficient repair and working condition, and so as to afford sufficient accommodation and due facilities for the passenger and goods traffic? The expenditure on all those items was absolutely essential to the working of the line.

23. I suppose the store was originally provided, and that you could not do without it?

Dr. Madden.—My learned friend is putting the question in a leading form, and witness is merely saying yea or nay.

Mr. Fooks.—I suppose there was a store originally provided?

His Honor.—That is what Dr. Madden objected to.

24. *Mr. Fooks.*—Was there an original store? Yes, a small store.

25. There was a new galvanised iron store built? Yes.

26. Was that new store necessary? Yes, we could not do without it.

27. Was it necessary to have a carpenters' shop and workshops? Yes, it was essential to the conduct of the undertaking.

28. Is it necessary to have an engine for moving the apparatus and machinery which you have in these workshops? Yes.

29. I suppose it is necessary for the efficient working of the undertaking that they should have a proper covering? Yes.

His Honor.—You are supposing everything.

Dr. Madden.—I only ask that the questions be put in a proper form.

Mr. Fooks.—I have in my experience put a great many questions like that.

His Honor.—Then it was very irregular.

30. *Mr. Fooks.*—Is it necessary that this engine should have a proper house?

His Honor.—That is a leading question; and you must put your questions so as not to be leading questions.

Dr. Madden.—My learned friend puts the questions in a leading form, and witness says "yes," "yes," "yes." We do not get any originality from the witness.

31. *Mr. Fooks.*—I ask him is it required?—is it necessary? We will get his originality by-and-by. (To Witness.)—Was any saving effected by having this engine, and by having it covered in the way it has been done? Undoubtedly; the arrangements were such as to induce great economy in fuel, and to give us additional power. Our first engine had been run to death; and we could not carry on our work without getting another engine.

32. What became of the old engine? It was sold, and the amount carried to the credit of the undertaking.

33. What was the sum obtained for that new engine? The new engine was purchased for £150; the old engine was sold for £210.

34. Could you have a new building put up without there being some new work in it—the work itself must be new, although it may be working maintenance or repairs. In this case labour was new, but the materials were second-hand? Yes.

I can quite understand that anything in the shape of maintenance or repairs—

Dr. Madden.—My learned friend extemporises the witness into a jury sometimes.

Mr. Fooks.—I am conveying to the witness exactly what I mean.

His Honor.—But your questions must not be statements.

Mr. Fooks.—I do not make any statement.

His Honor.—I beg your pardon, you are making statements, and he is saying yes or no.

35. *Mr. Fooks.*—As I understand you, you get greater efficiency in working powers? Yes.

36. Assuming that this was partly new work, can you apportion the new work that did not exist before, and that which was a simple substitution of something old. I will say part of the homogenous whole? I cannot apportion it.

37. Putting up porch in front of station to keep vehicles from front door. Why was that done? Because of the very great danger that ensued as traffic grew, from vehicles driving up too close to the door, and they usually do so very wildly. I then found it necessary for public safety that fresh arrangements should be made, and had the porch erected accordingly.

38. Gatekeepers' lodges—erection of 15 lodges, for which a rental of 3*s.* and 4*s.* per week each, according to size, is charged. When this line was taken over were there any huts or lodges in existence? A great many.

39. I think you put up some new ones, and some in substitution for or addition to other huts? Yes, but mostly in substitution for others.

40. Can you apportion that expenditure? To my own knowledge about £600 may be taken for works of substitution, and the balance for new works.

41. With regard to the store, that was not in existence before, a certain amount must be charged to maintenance because it was a renewal: can you tell me what part that is? About £40.

42. *His Honor.*—That £40 was for new work.

Witness.—It was in substitution. It gave us something that we already possessed.

His Honor.—And goes to revenue? Yes.

And the other goes to building? Yes.

43. *By Mr. Fooks.*—Was the new rolling stock that has been objected to absolutely necessary for the purposes of the line? Yes, absolutely necessary.

44. Is there anything in these items which is outside the powers of the Company "to from time to time alter, repair, or discontinue the works of the railway or any of them, and substitute others in their stead," as given in Section 7 of 33 Vict. No. 1? No, certainly not.

45. Give the reason why? The rolling stock question seems to have been somewhat misunderstood.

Rolling stock is very fluctuating, and to estimate that any particular amount of stock belongs to construction or to maintenance must necessarily be wrong. Perhaps it would be information to the Court if I read the account sent in to the Government as to rolling stock.

Dr. Madden.—Any letter that was sent shall be at your disposal at once ; but I object to the witness reading it now.

Mr. Fooks.—I cannot help the witness out of this.

His Honor.—Only give him time to refresh his memory from that paper, but he cannot put it in and say what he gave to the Government.

Witness (proceeding.)—In 1882 there were 14 engines, 48 coaches, &c. used for passenger stock, and 187 trucks, which we call goods stock of various kinds. In 1883 we disposed of an engine that was useless —then we had 13 engines, 61 coaches, and 200 trucks. In 1884 we had 16 engines, 69 coaches, &c., and 217 trucks. In 1885 there were 15 engines, 71 coaches, &c., and 223 trucks. In 1886 we had 14 engines, 69 coaches, 216 trucks. In 1887, 15 engines, 70 coaches, &c., and 210 trucks. Therefore there is no particular amount of rolling stock due to any particular year ; it is fluctuating.

46. Whenever these additions were made do you consider that they were absolutely necessary ? Yes, absolutely.

47. Have you got the correspondence between yourself and the Government in 1883 and 1884 ? There was one from the Colonial Auditor to the Chief Secretary, in which you are forbidden, without the consent of the Government, to increase the stock—

His Honor.—How does this make any of these items more or less maintenance or working ? It is outside the issue.

Mr. Fooks.—No, I do not think it is, because in the question of profits the contention of the Government is that there are such and such profits made, and that is why I want to have them. I will ask this question—Has there been any adjustment of the accounts of the Company showing the balance of profit, excepting in these quarterly abstracts you have rendered ? We have never rendered a profit and loss account. What we have rendered is simply an abstract of receipts and expenditure.

48. You have never given a profit and loss account, and therefore there have been none adjusted ? No.

49. You have continued that course up to the present time ? There have been no adjusted profit and loss accounts.

50. *Cross-examined by Dr. Madden.*—Take the first of the questions dealt with. You say that there was nothing in dispute until 1884. I believe that there have been continual objections to your expenditure ? Continual objections against our not spending enough.

51. Out of your own pocket ? Out of our own pocket.

52. There were continual objections that you should not spend out of capital ? Not until 1884.

Passing on to the items that are before the jury, I may perhaps put in a couple of letters at this stage. It has been agreed that these printed letters shall be put in as evidence. The first letter, then, was from Mr. Lovett, the Colonial Auditor, to you, and was dated 29th August, 1883, and is as follows :—

Audit Office, 29th August, 1883.

DEAR SIR,

THE Chief Clerk of this department, having completed the examination of the Main Line Railway accounts for the period ending 30th June last, reports to me—

That, consequent upon observing the exceedingly high ratio of expenditure on account of wages, stores, and upon the expenditure generally, close enquiries were made to ascertain the causes of such high ratio, and a review of former years' accounts was made, not necessarily with the view of objecting to former expenditure, but to enable a comparison to be made. It was found that all the rolling-stock placed upon the line prior to the year 1881 was paid for out of the Company's capital account, but that all the rolling-stock purchased and made during the years 1881 and 1882 was charged to revenue, under the head of "renewals." These remarks apply also to buildings or other erections. Although such new stock was not procured to replace any that had actually run into disuse, you contended that a certain percentage, say, 15 per cent., of depreciation on the original stock should be written off yearly, and an amount equivalent to such depreciation allowed to be paid out of revenue for new stock, buildings, &c., to be charges as renewals, and that allowance should now be made for the prior period in which such percentage has not been equalled by expenditure on "renewals." You further contended that, as the Company have virtually no capital account now (as you allege), there are no available funds out of which to pay for new works of construction other than the profits caused by traffic receipts exceeding the working expenses of the railway,—that therefore the Colony must pay for construction items ; that it is to meet the public requirements such works must be undertaken ; that the Government may avail themselves of the power of inspection as to the necessity of the construction work under Section 5 of "The Main Line of Railway Amendment Act," 34 Vict. No. 13, and therefore there have been included in the charges against revenue for the first half of the present year labour employed on the construction of carriages and waggons, and stores and materials supplied therefor, the charges being continued in the latter half of the year. You also remarked that two (2) second-class carriages had been purchased in Sydney at a prime cost of five hundred pounds (£500) each, which would be made a charge against revenue during the present quarter, and that two (2) locomotives were expected before the end of the year, which also would be charged to revenue. As the foregoing refers to matters of considerable importance, I shall be glad to have your confirmation of the same before I prepare my report on the accounts for the last two quarters.

I have, &c.

W. LOVETT, *Colonial Auditor.*

C. H. GRANT, *Esq., General Manager T.M.L.R. Company.*

53. You remember that letter ? I do.

54. And you sent this reply ? :—

Tasmanian Main Line Railway Company, Limited,
General Manager's Office, Hobart, 30th August, 1883.

SIR,

I AM in receipt of your letter, dated 29th instant, in which you state that after the recent audit of the Tasmanian Main Line Railway Company's accounts, you observe a considerable increase in the expenditure generally during the first six months of the current year as compared with the previous years, and that during the years 1881 and 1882 certain rolling-stock has been constructed with the revenue receipts, although not procured simply to replace any that had run into disuse. Also, that a similar practice had been pursued in regard to buildings and other erections.

You correctly state the facts of the case, and my contention that in theory a certain percentage (which I assume not to exceed 15 per cent.) should be annually allowed as the depreciation of the original stock placed upon the line; and that as the value of the Company's rolling stock must have (and indeed has) enormously deteriorated during the eight years and upwards it has been in use, they are at the present time equitably entitled to spend a very considerable sum in renewals or purchase of new stock, &c. I do not, however, desire that any fixed sum should be allotted to the Company for such renewals, but that the more comprehensive view, that they must provide what rolling-stock, stations, and other works are necessary to meet the urgent requirements of the traffic. That to allow the condition of the line or rolling-stock to retrograde, or not to advance in some proportion to the increased traffic, would be to make the railway a curse instead of a blessing to the country. That the history of every railway in the world necessarily shows a continually increasing improvement, and consequently expenditure, new sources of traffic are opening out which require to be met with special conveniences. Fresh districts present themselves as increasing customers of the railway, and require the stimulus of new sidings, goods sheds, cattle yards, or station buildings to allow them to develop a traffic which is as advantageous to the railway as to the districts. The increasing use of the line on occasions of public holidays by the large towns requires special arrangements and augmentation of rolling-stock suitable thereto, which I may exemplify by the occasion of the last Oddfellows' Demonstration at Elwick, when, notwithstanding the greatest possible care in the arrangements, we had about 2000 passengers at one time on the Hobart platform without having a single carriage at any time in the yard to convey them with. It is true that they were, in time, duly carried to their destination; but had the least hitch occurred, the great deficiency of stock we now suffer from must have disappointed a very large number of passengers.

On several occasions, in addressing the various ministers of the Government, I have pointed out that the Railway Company must advance its expenditure with increasing traffic, even to the extent of expending large sums in the entire remodelling of station yards; in the erection of new stations; improvements in construction, including therein the replacement of wooden bridges and culverts with permanent structures of masonry or of iron; also the provision of improved rolling stock, such as post office vans, sleeping carriages, and various special contrivances for facilitating the handling of merchandise.

I also informed you as a fact that the Railway Company have, at the present time, virtually no capital account, nor any means whatever by which they can raise money for the purpose of expending it on the line. Their borrowing powers are fully exhausted, and although they have nominally some non-issued share capital, I need hardly remark that no money could be raised upon the very deferred interest it represents. Their only available sources, therefore, are the surplus revenue receipts, supplemented by the guaranteed interest paid to the Company.

Since the line has now arrived at the position that the guaranteed interest of £32,500 per annum is practically assured to the mortgagees, who by special act of the Imperial Parliament virtually control the management, it is not reasonable to suppose that they would allow their officers to expend any part of such interest in improving the line when the whole benefit thereof would necessarily appertain to the colony alone,—the more especially as the Government have frequently intimated their desire to purchase the Railway, in which case its valuation would not probably (at the present time) be dependent upon what had been expended thereon, but be treated upon the principle of the value of an annuity of £32,500 per annum extending over the remaining period of the contract, or, say, for 23 years.

On these grounds I contend that there are no available funds out of which to pay for new works or new rolling-stock other than the profits of the undertaking. As to the power of the Government to control such expenditure, I entertain no doubt that the 5th clause of the Act of Parliament, 34 Vict. No. 13, places them in a position to officially ascertain everything that has been done, or is proposed to be done, on the line; while the 10th clause of the contract enables you to determine the exact cost of such works; and that therefore the Government are in a position to fully acquaint themselves as to the particulars of any improper expenditure of the revenue contemplated or performed, and consequently to take action to remedy the evil.

I have only to add that you correctly state, as being included in the charges against revenue in 1881 and 1882, the cost of labour and materials used for the construction of carriages and waggons; and that two second-class carriages have been purchased in Sydney, and two locomotives are shortly expected from England, the cost of which will be charged against the current expenditure of the year.

I would finally remark, that the cost of the new rolling-stock and station improvements, paid for with the revenue receipts up to the present time, is a wholly inconsiderable part of the sum that any well-established railway company would appropriate for depreciation and renewals during the length of time that this railway has been open for traffic; the simple reason for such very small expenditure being the want of available rolling-stock, which difficulty, I trust, will never arise in the future.

I have, &c.

C. H. GRANT.

W. LOVETT, *Esq.*, *Colonial Auditor.*

Yes.

55. That correspondence brought about the dispute? It arose in that way, certainly.

56. The Auditor in his letter brought your attention to these matters, and you admit that he correctly stated them? He wrote me a courteous letter, and I sent him a courteous reply, instead of telling him to "go to blazes."

57. Have you had interviews with the Colonial Auditor? I have.

58. In the course of those interviews was it not pointed out to you that the Government would not allow new work to be charged to revenue, though they would allow renewals to be so charged? No.

59. Am I to understand, then, that you never grasped the fact that it was pointed out to you in conversation that the Government would not object to any renewals of existing works or rolling stock, though the renewed stock exceeded in value the old? No. In point of fact, it was not until September, 1884, when the Chief Secretary (Mr. Douglas) took the matter up, that these directions were given.

60. Do I understand you to say that in the interval between the correspondence which I have just read and the receipt of the letter from Mr. Douglas, in 1884, the Colonial Auditor had foregone discussion on this very question with you, the representative of the Company? I might have had conversations with the Colonial Auditor on the subject, but he did not seek to control my actions or interfere in any way.

61. Did he intimate to you that the Government had resolved or were of opinion that you might be allowed renewals even though they were of greater value than that which they renewed? I do not remember any intimation of the kind. We discussed the question, but I never understood Mr. Lovett to have expressed himself as you have stated.

62. You say the Chief Secretary (Mr. Douglas) wrote to you in 1884? Yes.

63. You saw the Chief Secretary then? Yes.

64. What passed between you? A very great deal passed, in very many interviews.

65. Was the effect of what passed between you a crystallisation of the question? In a way.

66. I have stated that the Government would not permit you to take from gross profits for purchases that were not renewals. On the 13th October, 1884, a letter was sent from the Chief Secretary stating that he would not permit such deductions from revenue.

Which letter was that? A letter dated 13th October, 1884. Will you read it?

Dr. Madden: Yes. It is as follows:—

Chief Secretary's Office, Hobart, 13th October, 1884.

SIR,

THE Government have arrived at the conclusion that it is absolutely necessary to prevent your applying the whole of the revenue of the line to improvements, new plant, &c. It is therefore desirable that you should agree to certain defined conditions, comprising, amongst other things, the following :—1st. That no additional trains shall be run; 2nd. That no new works shall be undertaken; 3rd. That no additional engines or other rolling-stock or railway plant should be purchased; 4th. That no additional buildings should be constructed, or improvements, as regards those now erected, carried out, unless with the sanction of the Government. The Government has likewise come to the conclusion that the sum of £5863 18*s.* 9*d.* must be deducted from the interest until the disputed items included in that amount are settled between the Government and the Company.

I have, &c.

ADYE DOUGLAS.

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

I see I put in that letter, now that you say so, dated October 13, 1884.

67. I have here a letter, sent by you, enclosing certain particulars: do you remember that? I might, if I had it before me.

68. Did you ever receive a request that you should draw out and furnish to the Government a specific list of the new works which were not in existence in 1882? I did.

69. Yes; and did you reply to it? I can't say.

70. And do you know that return which you made of works which were new works and works which were not in existence in 1882 is the list of the very items we have been discussing these past two days? Quite so.

71. It was covered by this letter, was it not?—

Tasmanian Main Line Railway Company, Limited,
General Manager's Office, Hobart, 1st July, 1884.

SIR,

WHILE acknowledging your letter of the 5th ultimo, I have the honor to forward herewith a statement, prepared at your request, of the cost of works constructed during the year 1883 that did not exist in 1882, and also the cost of the additional carriages and waggons provided during the past year.

The expenditure on carriages and waggons may seem considerable; but it should be remembered that none of the rolling-stock had been renewed since it was put upon the line, and therefore we have the deterioration of nearly nine years to make up for in order to restore it to the position it should occupy as an asset of the Company.

I might also state that the provision of such new stock was absolutely necessary for conducting the present traffic; but it is still greatly below what the necessity of the service demands. It may be of some value to state that the rolling-stock supplied by the Company, and not paid for entirely by their own capital account, amounts to £80,000, calculated on the present price of such articles; but I am unaware that the Company paid very far more than this price when purchasing it through contractors.

The necessity for undertaking the other works will be so apparent to you that I am sure it is needless for me to remark thereon.

I have the honor to be,
Sir,
Your obedient Servant,

W. LOVETT, *Esq.*, *Colonial Auditor.* C. H. GRANT.

72. Well, then, yesterday I put in a letter of the 27th of April, 1885, which covers the second return before the jury.

Mr. Fooks: Why don't you go on with the other letter?

Mr. Miller: We have not got that.

Dr. Madden: It is the one put in yesterday, dated the 27th April, 1885.

73. *Cross-examination resumed.*—Well, then, come down to the trial of this case. For some time before this you have been aware what was the contention between the Government and the Company. You knew what this was? The items were raised by me; consequently, I knew what they were.

74. You had been discussing this matter for some time: now, did you at any period of that time fully understand what they wanted? Yes, and replied to their requests.

75. You intended these to be replies? Yes, I intended them to be courteous replies. I did not intend them, however, to be technical replies.

76. As a business man you made these replies? Yes.

77. You knew that working items were distinct from renewals? Yes.

78. Yet in your returns you speak of them thus? The wording of them speaks for themselves.

79. Bearing that in mind, we will take, first, that where you were asked originally by the Government for a statement to include all works, as distinct from any new works, such being renewals, and you gave, first, that of "Hobart—erection and fitting up internally of store in Hobart yard, and alteration of original store, to form continuation of carpenters' shop, £346 8*s.* 2*d.*" Have you the letter from me?

80. I have not; but I understand you were asked for it, and said "yes"? There was such a request made—an informal request.

81. You understood what was asked for, and gave it? I suppose so, although, as I have said, it was only an informal request.

82. That account they asked for from you is really the matter you have been fighting for years. Do you now understand what the contention is between the Government and your people? Partly.

83. You understand that the Government did not wish you to charge for the new rolling stock, what was absolutely new, under the head of replacements or maintenance? No, I cannot say so.

84. You cannot say so. Do you say, then, that you never understood that what was objected to was that these new engines—this new rolling stock—had been charged all as renewals? I confess I never did.

85. You never did this, or gathered it from these documents? Not fully.

86. What have you gathered from them, then? I gathered that they asked us to draw out a capital account.

87. That is, that they allege there were certain amounts which should go to a capital account—for instance, new buildings, new rolling stock. Was not that what you gathered from this correspondence? I could not gather anything except that there was a general contention that there should be a general account for all these.

88. After years of correspondence and discussion, and after years of preparations for litigation, you say you do not know, that you have not gathered, that the Government had made you a present of new engines and other things, but now insist that you have no right to charge them with new things—new rolling stock and other items—which are not really renewals? I have not.

89. What, never to this hour? No, never to this hour; and, besides, it is utterly wrong to state that the Government gave a present of anything to the Company; they gave nothing. I have only had what I have taken myself.

90. At the Government's expense? Oh no, not at all.

91. Then you say that the Government did not make you a present of anything, and that the Government did not contend that you were not at liberty—that out of the gross profits you should not be at liberty to charge the new engines which were bought in anticipation of the growing requirements of the railway? No. The Government have never contended anything of the kind.

92. You never understood that? All I understood from the correspondence, and from such interviews as I had, was that the Government desired to establish a capital account.

93. For what purpose did you understand them to desire to establish such an account? For the placing of certain items which they considered should be charged to a capital account.

94. Have you any items that it was suggested should be placed to that account, or are the jury to assume that you mean that certain sums which are in these items should go to form a capital account? I know the Government gave that impression.

95. Do you know the principles upon which they were selected? Certainly; they were selected from works which had existed one year, but which had not existed the previous year.

96. You have made a statement as to what you look upon as being embraced in the controversy. Now, do you know Mr. Speight, Chairman of the Victorian Railway Commission? Yes, certainly.

97. Are you aware that the Government invited him to report on these very items? I believe so.

98. And that he reported thereon. Now, were you not asked to wait in the matter till that decision came to hand—asked to delay doing anything in the matter till then? No; on the contrary, it was I who first suggested that the Government should join me in getting his opinion, but they did not answer to that, but went behind my back and got him to report for themselves.

99. Listen to this letter from Mr. Burgess, the then Colonial Treasurer, dated January 30th, 1885, in which he says—

I HAVE the honor to acknowledge receipt of your letter of the 29th instant, in reference to the subsidy account of the T. M. L. R. Company for the quarter ended the 31st December, 1884, and stating that you had called at the Treasury but failed to obtain payment of the amount claimed by you on behalf of the Company.

In reply, I beg to draw your attention to my letter of the 29th October last, when I had the honor to pay you the sum of £8100 on account of guaranteed interest for the quarter ended 30th September. On reference to this letter you will see that I then took the opportunity of entering a protest on behalf of the Goverment against the payment then made, on the ground that the sum of £5989 17*s.* 11*d.* was claimed by the Government as an expenditure improperly made by the Main Line Railway Company, as had been previously intimated to you by my colleague the Honorable the Chief Secretary; and I then informed you that if no satisfactory arrangement was made between the Government and the Company as to the working of the line and proper expenditure for maintenance before the guaranteed interest for the December quarter became due, the sum of £5989 17*s.* 11*d.*, as well as any other amount to which similar objection can be taken, would be deducted from the next payments to be made under the head of guaranteed interest. You were therefore made aware, in ample time, that unless some satisfactory arrangement was arrived at, the course to be taken by the Treasurer was clear.

Mr. Speight, Chairman of Victorian Railways, as you are aware, has been asked by the Government to report on the matter now in dispute; and upon receipt of his decision, which I have every reason to believe will be forwarded next week, I shall be prepared to inform you what course the Government will take.

As I stated when writing you in October last, the Government is most desirous of avoiding any financial embarrassment to the Main Line Company; therefore, if in the meantime it will be any convenience to your Company to receive payment of the difference between your claim and the amount in dispute, I shall be glad to give instructions to carry this out, or would you rather wait until Mr. Speight's report is in the hands of the Government?

Did you get that? Yes.

100. It was to the effect that the account could not be dealt with until they got Mr. Speight's report? The letter shows so, but that does not affect my previous reply.

Mr. Byron Miller.—Pardon my interruption, but what is the date of that letter?

Dr. Madden.—The 30th of January, 1885.

101. *Cross-examination resumed.*—Now, in this letter Mr. Burgess says, "As I stated when writing you in October last, the Government is most desirous of avoiding any financial embarrassment to the Main Line Company." Did you get that letter to which he alludes? I have no doubt I did.

102. Do you remember Mr. Speight's Report?—it was forwarded to you, was it not? Yes.

103. And subsequently discussed by you in your letters to your Board of Directors in London? Yes.

104. And you forwarded it to your Board of Directors, did you not? Yes.

105. Then, seeing that you received and read that report, that you wrote about its contents to your Directors, do you still say that you do not understand what is the contention of the Government? I do, in its general terms.

106. In its general terms?—that is not what I asked. Do you say that up to the present time you have never grasped the effect of what items the Government say should be charged to a capital account,—for instance, those items which exist in 1883 but did not exist in 1882? Quite so. I will explain it a little more if you like.

107. You have given me your answer to what I asked you. You can explain it if you like in your re-examination.

Mr. Miller.—Yes, we'll ask him to.

108. *Dr. Madden.*—Very well, then. Mr. Speight reported under date the 2nd March, and in that report he says, "The whole expenditure enumerated in the list submitted to me, amounting to £5987 7*s.* 11*d.*, with the exception of £125 19*s.* 2*d.* for restoring the damage done by fire at Bridgewater, is properly a capital charge, and would have been so provided by a company with any capital at its disposal; but if the revenue account for 1883 was credited with £1707 10*s.*, the amount realised from the sale of one engine and ten waggons, the value of the working stock provided out of capital would be reduced by that sum, and it therefore should be deducted from the £5989 17*s.* 11*d.* before the net improvement in accommodation for the year 1883, properly chargeable to capital, could be ascertained." That point was brought under your notice by Mr. Lovett, who asserted exactly what Mr. Speight mentions in his report, and you admitted that it was so? Yes.

109. Very well. Mr. Speight concludes his report by saying—"If the Tasmanian Main Line Company are to continue to run and work the railway, and the Government are willing to waive the contention that any capital required to efficiently work and maintain the railway should be provided by the Company, and this I recommend them to do, there should be a clear understanding as to how the amount now in dispute is to be dealt with, and the circumstances under which future expenditure of a like character should be incurred. The simplest settlement would be to earmark the outlay so that it can be identified whenever a valuation takes place, and in future the Company should obtain the assent of the Government before incurring any expenditure of that character, and be agreed as to how the money is to be provided. But, looking at all the circumstances, and the future of the Tasmanian railways, the desirability of not having two systems of railway ownership in the Colony, and the liability to dispute and divergence of opinion as to what are the interests of the Company and those of the Colony, I strongly advise the Government to come to some equitable arrangement with the Railway Company for acquiring the railway." Now, you had in this report distinctly placed before you these items, amounting to £5987 less the item for restoring the damage done by fire at Bridgewater, which Mr. Speight says should go to a capital account. What do you say about that? Well, I don't say so. Mr. Speight may be a very good railway manager, but he shows himself a very bad lawyer, and I consider that opinion of no significance whatever.

110. And notwithstanding that report, you never understood it to be that the dispute was that these were chargeable to capital and not to maintenance and working? My reply is, that the Government have already paid into Court some of the money.

111. Now, Mr. Grant, you have imputed that Mr. Speight was a bad lawyer, and I think you had better leave questions of law alone. You are showing yourself to be a bad lawyer, and you had better stick to railways. Now, on the 16th September, 1884—

Chief Secretary's Office, Hobart, 16th September, 1884.

SIR,

IT appears from the Report of the Colonial Auditor for the year 1883 that a large expenditure has been incurred by you upon the Main Line Railway which cannot be passed as forming a legitimate charge against "maintenance."

The several items to which exception is taken is set forth in the enclosed document, to which the Engineer-in-Chief has appended the following minute:—

"I consider that the whole of the items herein detailed are a legitimate charge against construction rather than against working expenses; but as the charge marked A. was the result of accident, I should recommend that it be accepted as against working expenses."

It is evident that by continuing to make these alterations and additions to the property of the Company at your discretion, the Colony can never derive any pecuniary benefit from the increased traffic and consequent earnings of the line, as contemplated by the terms of the contract between the Government and the Company.

Under these circumstances it is necessary that a clear understanding should be at once arrived at and placed on record, defining your powers as regards the expenditure of revenue derived from the working of the line, and also the powers of the Government to prevent the appropriation of such revenue to objects not contemplated in the contract.

The amount which the Government consider to have been improperly charged to "maintenance" in the accounts now under review is £5863 18*s.* 9*d.*, and I shall be glad to learn how you propose to repay that sum to the Government.

I have the honor to be,
Sir,
Your obedient Servant,

C. H. GRANT, *Esq.*, *Manager Main Line Railway, Hobart.* ADYE DOUGLAS.

Now, among these working expenses there is one for repairs to the Bridgewater station: had you no difficulty to grasp why that was paid? Not at all. That is not in the question at all.

112. Do you understand why it is not in the question? Yes.

113. If so, why don't you grasp that the money you asked for was to pay for things not in existence before. The Bridgewater item was to rebuild the old building which had been burnt down: do you say you did not understand that? I dare say I could have done so if I had taken sufficient trouble to analyse the items.

114. But you didn't—you passed it by, like the Levite, on the other side: could any person fail to see it, even of the most limited understanding, if they looked into it? I don't know. I suppose so. I did not bother about it. I was content to act under the contract. I only received money on account of interest.

115. Very well, if you say so I am bound to accept your statement. Very good. The 16th of September was the date of the letter I was referring to. Well, I had just reached that part of the letter in which he pointed out that the items are all of them legitimate charges against construction and not against working expenses. In fact, he says:—

I consider that the whole of the items herein detailed are a legitimate charge against construction rather than against working expenses; but as the charge marked A. was the result of accident, I should recommend that it be accepted as against working expenses.

It is evident that by continuing to make these alterations and additions to the property of the Company at your discretion, the Colony can never derive any pecuniary benefit from the increased traffic and consequent earnings of the line, as contemplated by the terms of the contract between the Government and the Company.

Under these circumstances it is necessary that a clear understanding should be at once arrived at and placed on record, defining your powers as regards the expenditure of revenue derived from the working of the line, and also the power of the Government to prevent the appropriation of such revenue to objects not contemplated in the contract.

And after that follows an appendix setting out these items which are in dispute, and the heading is this—"Expenditure during the year 1883 on works not being renewals that did not exist in 1882." Now do you say you did not understand what the dispute was on that date? I understood the Government wanted to charge certain items to capital, but the Government never said to me, let us go through these items.

116. I know what you have said and what the witnesses have said, but, now, was it not brought under your observation that in the list of expenditure for maintenance were items for works which were not renewals? Yes.

117. And that some of these, indeed, were absolutely new? Yes.

118. Very well, then, we have this list before the jury. Now do I understand you to say that you did not understand that you did not know what the Government contention was as being one respecting these renewals and new stock? I did not understand anything.

119. What! when you got that letter you did not understand that the Government insisted that you should not charge them with works which were in contradistinction to renewals? I took no notice of it.

120. You were the local head—the responsible representative of the Company—in this Colony, yet when the Government brought this matter down to a pin's point, you say you did not understand it—that you took no notice of it? They did not bring it down to a pin's point.

121. And you did not understand what they wanted? I understood the general drift of it.

122. You knew what was the general drift of it. Did you not know about these items? I clearly knew what these items were for; I laid them out myself.

123. You understood that the Government meant by putting it under your notice to tell you that they were not proper charges to repairs or maintenance? If they did so, they were outside the contract and I was inside it.

124. I cannot cross-examine you if that is how you are going to answer? I cannot understand.

125. Now tell me, although that request was delivered to the Colonial Auditor, and the Government sent it back to you with this heading, did you ever write back at any time and say that in this store erected some portion of it was a renewal? I did.

126. When did you?—tell me when did you direct attention to the fact that the building was not wholly new? I cannot say, but in my letter to the Chief Secretary I had gone into particulars.

127. I have that document, and it speaks for itself. Did you at any time afterwards write back to the Government telling them that the new building, together with others, had some renewals in it? There are the words, they speak for themselves.

128. You never corrected the Government. You never told them there was any misunderstanding? I did not consider myself called on to do so.

129. Did you at any time convey to them the fact that there was something under the head of this building which was not renewals? Yes, in words and in explanation.

130. Give me the letter. (Letter handed by witness). You see here was a letter which you forwarded on the 7th of October, 1884.

Mr. Miller.—The reply to your letter. You have asked the witness as to whether he did not know the intentions of the Government, and he said he did, and replied to it. In the next letter there is a reply, and I say in fairness you ought to read that.

Dr. Madden.—I shall be delighted to put this letter in when the proper time arrives. This letter scarcely contains a reference to the letter I mentioned. I see the document does refer to it, and I shall cross-examine on that. This letter, dated the 7th October, 1884—

Tasmanian Main Line Railway Company, Limited,
General Manager's Office, Hobart, 7th October, 1884.

SIR,

I HAVE the honor to acknowledge the receipt of your letter dated the 3rd instant, and duly note that you will be prepared to enter into a mutual arrangement with the Tasmanian Main Line Railway Company, Limited, for the object you state, and that you desire to know my views on the subject.

You proceed to remark that the Government must take steps to decide whether the sum of £5863 18*s.* 9*d.* is fairly charged against Revenue, and thereby traverse the whole question for consideration.

As a preliminary thereto, it is doubtless necessary that you should be more fully informed as to the nature of the expenditure. I therefore enclose a detailed statement of the circumstances under which it became necessary, and believe that a perusal thereof will satisfy you as to its being rightly incurred and charged in the Company's accounts. Should any doubt remain on your mind I shall be happy to furnish additional particulars, and further evidence of the practice of other Governments and Companies in maintaining their railways; or to concur with you in obtaining the opinions of those authorities who have the most experience in such matters, and whose advice would doubtless guide both the Government and the Company in the proper adjustment of the accounts.

In considering this question it is only equitable to remember that the amount of capital on which interest is guaranteed did not nearly suffice for the construction of the railway, and therefore that large sections of the proprietors have never received any interest whatever on their investment, nor is it probable that they will do so for many years to come; while it cannot be too attentively borne in mind that any improvements of the property must be for the present benefit of the Colony, and not of the Company.

It will be necessary that I submit to my Directors any proposition you may assent to for an arrangement of the matters in question; but I am able to assure you that they are most anxious to meet the views of your Government, as far as they possibly can without doing injustice to the stockholders. Such being the case, I feel sure you will not think of doing such an irreparable damage to the Company as the temporary stoppage of any part of the guaranteed interest becoming due to them could not fail to inflict.

I have, &c.

Hon. ADYE DOUGLAS, *M.L.C., Premier and Chief Secretary.* C. H. GRANT.

And then follows an explanation, in which you say:—

Explanation of some Items of Expenditure by the Tasmanian Main Line Railway Company, Limited, during 1883.

Amount. £ s. d.	Reason for Outlay.
346 8 2	It was absolutely necessary that the Stores Department should be removed from its original position, on account of the total insufficiency of room for the increased stock of material that a largely developing traffic rendered it necessary to keep on hand; and of the very serious annual loss from the injury sustained by part of the stores owing to the situation of the building next the smithy, (which has been altered since its original construction to enable the necessary repairs of stock to be done on the premises, thus placing it too close to the store). To have otherwise remedied this evil would have entailed nearly as much outlay as building the galvanised iron shed on a more suitable site for a store, while the room vacated was urgently needed as a carpenters' shop. The saving in the above particulars has already repaid the whole cost of the new shed.
721 13 5	The portable engine originally supplied for the workshops being so much worn as to require very costly repairs, and moreover not being powerful enough to work all the machinery at one time, the growing necessities of the railway required the use of a more powerful engine and boiler. This again compelled the erection of a building to cover it, and of a chimney-stack to give the draught; while, for the sake of economy in fuel, the boiler had to be permanently seated. The effect has been that, with twice the power in the engine, the consumption of coal and water is very greatly reduced, and a large annual saving will be effected, with increased efficiency for doing the ever-expanding work. The engine purchased was an old one, and its cost less than the sum obtained for the engine it replaced.
91 13 11	The erection of the porch at Hobart Station became an absolute necessity to prevent accidents. Everyone who formerly travelled by the railway experienced the danger caused by cabs driving up close to the front door. The material for this porch was long since obtained, but its construction was not so much a necessity until the large increase in the local traffic, and the enormous compensations paid for injuries obtained by suitors in Victoria, New South Wales, &c. showed the very urgent necessity for taking precautions to lessen this source of danger to life and limb. It cannot be called an elaborate or expensive work.
139 9 8	Is only partly due to additions, it not being possible to separate mere repairs and additions. The new part was rendered necessary for the suitable accommodation of a married stationmaster. The original quarters were two rooms only, and the station was simply regarded as a mere stopping-place. Recently, however, the local and other traffic at this station has immensely increased, which necessitated a superior station agent being appointed to the charge. The station has proved to be the second on the line in regard to the number of passengers, but this could not have been anticipated.
736 14 11	At the time when the line was constructed it was customary on the railways, both in this and in the neighbouring colonies, that the gatekeepers should erect their own huts or live in tents; and the gatekeepers on the Main Line Railway were quite content with this arrangement; but, at the close of 1882 and in 1883, the labour market became most seriously deranged, consequent upon the activity at the mines and the construction of the Emu Bay and Mount Bischoff and the Mersey and Deloraine Railways. The Main Line Company lost many of their best men, who thereby obtained an increase in wages of from 5*s.* to 8*s.* per day, and even more. Many of the Company's best employés left the service; and others, who were not comfortably located, gave notice to leave unless they were forthwith provided with huts. These men could not then have been replaced, and the line must have been worked under great difficulty and at *very serious risk*. To prevent this huts were put up at a very low cost. Both the Colony and the Company were benefited by the outlay—for these huts ensure that the men shall live along the line, as is a vitally important requirement. It will be noticed that, independent of fulfilling the absolute necessities of the case, these huts pay yearly a rental equivalent to interest at the rate of 20 per cent. per annum on the outlay.
3827 18 8	The Company have made no secret of the fact that they were building new rolling stock, both to replace the light carriages which through long use had become unsuitable for their fast trains, and to accommodate their greatly increasing local traffic. It would now be impossible to work the line with the quantity of stock that sufficed only three years since; and the present supply is not sufficient for convenient and proper working at excursion times. To maintain the value of the rolling stock first put on the line the fund agreed to in my letter to the Hon. the Premier, of the 10th October, 1882, and in his reply of the following date, must be formed, either in cash or by expending the allowed proportion in new rolling stock—the latter being the most profitable use that can possibly be made of the fund. A further diminution in the value of the property in rolling stock was caused by the sale of a locomotive engine and ten trucks, as alluded to in the Colonial Auditor's report. On equitable considerations, therefore, as to the terms of the agreement between the Government and the Company, the expenditure for the renewal of rolling stock was much below a reasonable amount, which will necessarily have to be made up in future years. It is certain that if the railway is to be continued in efficient working order, both engines, carriages, and wagons must be renewed, and additional stock added as the traffic increases. At the opening of the line the contract service of two trains daily on any part thereof amply sufficed for the traffic, which has since so greatly developed that 22 regular trains on Saturday and 20 on other week days either enter or leave the Hobart station, besides which three or four special trains weekly are required, while the increased traffic at excursion seasons is far more than the whole present stock can properly transport. No argument can be needed to prove that the carrying resources of the Company have necessarily expanded, and must continue to do so, in order to cope with the growing traffic.

131. That was the explanation you gave. You point out to the Government that there was a lot of material supplied by the Company? No.

132. And you did not do it at any time? I suppose not; and, besides, I did not consider it necessary, because the item itself shows it.

133. No, the item itself did not show it, but it might suggest it. Except that, then, you know of nothing else that would suggest it? I called attention to the fact, and suggested a conference respecting the matters in dispute.

134. Ah, yes! conference and adjustment mean everything and nothing in regard to building a railway line. Well, now, as to the next item. Did I understand you that the value of the fixtures as distinct from the old building was £40? The cost of removing them—that and making them good was £40.

135. Now tell me, what really was done? Well, the office building was moved.

136. What did the office consist of—was it a little building in the corner? It was the storekeeper's office, and certainly was in the corner.

137. And what was it made of? Match boarding.

138. Match boarding? Yes, match boarding, and with a partition.
139. What was its size? I do not know.
140. Well, never mind being so exact—what was about its size? Well, about 14 feet square.
141. And had a door in it, I suppose? Yes, and a window in it too.
142. Yes, and a window. Well, what was the height of this building? About 16 feet.
143. Very good. Beside that were there any fixtures in the place? There was a very large amount of fixtures in the place.
144. What kind of fixtures? The usual office fixtures, shelves and so on.
145. What quantity—where there many shelves? I can scarcely call to mind.
146. Were there half a dozen? I can't say; perhaps so.
147. Surely you can tell us if there were twenty, or twelve, or six, or if there were only one or two. Now, how many do you think there were? About three, I should say.
148. This was as distinct from the office furniture? Yes.
149. Now, what other fixtures were there? There was a cupboard.
150. What sort of a one—a plain deal one? Yes.
151. What was the value of this office—you took it down, I understand? Yes, it was taken down, and put up on another site.
152. Were the same materials used? Not the whole, but the most part.
153. Now, are all these the fixtures?—have you mentioned them all? Yes, I think so.
154. Very good. Now, how long would it take a carpenter to first take it up and then put it down on the new site? Oh, I can't say.
155. Can't you say about how long—surely you can do this? No, I can't say; it would take some time.
156. Do you mean that the cost of taking it up and putting it in the present position cost £40? No, certainly not. But how about providing for the fittings for about £8000 or £10,000 worth of stores?
157. What did the part I speak of—the little compartment in the corner, and the shelves at the end of it—cost? I could not tell.
158. About what would it cost, then? Say £10.
159. And was this new building fitted up with all these valuable fixtures?—for instance, a lot of old boxes and such like, I suppose? The fittings were moved across.
160. What fittings? The fittings for the stores; there must have been at this time about seven or eight thousand pounds' worth of stores in the place.
161. Well, what had that to do with it? Well, it would take some time to move them.
162. And you included that in your charge? Yes.
163. You say it would take some time to remove them? A very considerable time.
164. What would it cost, this charge for labour? Well, the price we put down for labour was a large sum.
165. Well, what was the cost of taking those fixtures from one place to another? I cannot say.
166. Well, you can give us some idea: what would you think it would cost? I should not like to contract to do the work under £30. There was a very large amount of it which was pure labour.
167. We may take £40 as about representing it? Well, you may do so; it would be from £35 to £40.
168. Very well; we may take it that £40 would cover the whole box and dice—the cost of the portion put into the new building, and which might in any sense be called renewal? Yes.
169. Very well. Did you include in this the carrying over of the stores as well as the fixtures? No.

His Honor.—I understood the witness to say the cost was £30 for the removal of the stores.

Witness.—No, Your Honor; the cost of removing the fittings.

His Honor.—I misunderstood you, then—

Dr. Madden.—The other item of which you speak was to include the chimney-stack and building the covering, as an exchange of buildings, the old one to be used for a locomotive shop, I think you said? That item is in the building charge.

170. That brass furnace—it is not included in this charge at all, is it? We had a brass furnace before.
171. You put this one in, then, as a substitution? Yes.
172. And no part of this sum represents the furnace? No.
173. Then, practically, this was a new structure, was it not? No, not perfectly new.
174. Not perfectly new—what do you mean? It was perfectly new on a new foundation, and a new building in every respect? It was a new building of old material though.
175. It was built of new bricks? No, it was built of second-hand bricks which we had bought.
176. They were bricks you had by you? They were bricks we had by us.
177. You built it on a new foundation in a different position, and subsequently you sold the old engine. Is not that so? It is.
178. Well, now, as to these huts—these gatekeepers' huts—you say there were many existing huts for which the present cottages were substituted. Are you able to speak of your own knowledge and say that there were many of these? Yes, many.
179. How many? I could not say; a good many.
180. A good many, and yet you cannot tell us how many. Tell me which were the existing old huts, and for which there are now new huts? If I had a schedule of them I could say which were which.
181. You cannot say there are six hundred pounds' worth of them; can you give me one, now. Can you particularise any one hut so replaced by a new cottage—any one for which the present building was substituted as a renewal? Without the schedule I could not say.
182. As a matter of fact, let me ask you if you have any personal knowledge of this matter? Indeed I have.
183. Very well. If you have, now let me ask you if you ever at any time suggested to the Govern-

ment, when you knew what was their dispute—when you knew that they contended these cottages were new buildings—did you ever suggest to them that these had been the old bark tents and mai-mai huts? They never asked me.

184. Never mind whether they asked you or not; you were dealing on behalf of a most important company, and it was not a question for them to ask. When they said they would not pay, did you ever point out that they were renewals? I can't say that I did.

185. You did not enlighten them in their darkness? No, I did not.

186. Now, I ask you to tell me one instance in which you know of a new cottage being erected on the site of an old hut? I do not think I can do so; they were not put up on the precise spots, but where they were wanted.

187. Now, would any person live in those old huts? They did live in them.

188. Oh, yes; somebody lived in them possibly at first. Tell me what were these huts made of? Well, they chiefly consisted of huts put up out of the large packing cases in which the contractors imported the material in the early times.

189. Then, the contractors sent the stuff for these huts up to the places? Yes.

190. Then, they were the contractors' huts? But the contractors did'nt finish the line.

191. What do you mean? The Company took forcible possession of the line from the contractors, and completed it.

192. Oh, I see. And as soon as the line was completed did the men continue to live there? Some did.

193. Some did, and others, I suppose, objected? Yes, others objected; and as we had to have the crossings attended to in the interests of public safety, we had to find places for the men who complained.

194. Did any of the servants of your railway—the regular employees of the Company—ever live in them? Yes.

195. Tell me any single case in which an employee permanently engaged on your railway lived in one of these old huts? I cannot. I am in the same position that I am when you ask me to state exact cases of new huts being put up on the old sites—although I know cases have occurred.

196. You cannot tell me any one. No, not any particular instance. I dare say there are many persons in this room who recollect them.

197. Now, you cannot tell me any instance in which these huts did office? There is no doubt they had served for a time.

198. Do you say these particular cottages were erected on the site of those structures, whatever they were? Some of them.

199. What is the nearest one, the nearest case you can recollect? They were practically on the same site; they were just rough lodges for the gatekeepers—that is all they were.

200. Many of the gates were erected after the contractors gave up the line, were they not? Not many; it could not have been more than one or two.

201. Can you state any case of your own knowledge? No.

202. Do you undertake to say how many of these huts at the side of the gates were constructed after the opening of the line, and after the roads were opened? Yes; I do not remember more than one at the present time—that of the Tea Tree hut.

203. At every one of these gates was there a hut? Not at every one.

204. Well, now I suppose these old huts belonged to the individuals in possession of them? Oh, no.

205. Who, then, did they belong to—to the contractors? No, to the Company; they took over everything when they took forcible possession of the line from the contractors.

206. Now, were there not some tents as well as these huts?—were not some of the men working for the contractors living in tents at the time you took over this line? I dare say there may have been.

207. You think there may have been. Now don't you know there were? Don't you know there was a tent in which some of the men were living? I believe there was a tent.

208. Now tell me did that tent ever come into the possession of the Company? I cannot say.

209. You cannot say? No. I know nothing about it.

210. Then for all you know the man may have carried it off as his swag, and may have disposed of it? I cannot say. He may have done so.

211. Then it never absolutely came under the control of the Company? No.

212. And that is why you cannot say what became of it? I do not know what became of it. They were too bad to be used as tarpaulins, or we might have used them for that.

213. You do not know if the contractors had paid for them; how, then, could they have belonged to the Company? We took over everything, and paid for the original structures.

214. The construction of a line is not a tent? But it is a tent.

215. Am I to understand these huts were paid for by the Company when they took the line from the contractors? I have told you we took forcible possession of the line under the contract.

216. You did not take forcible possession of the men? They were not in the contract.

217. They were occupied on it. Now regarding this hut, you do not know what became of it? No.

218. That seems a very neat answer to the problem. Now, regarding all this rolling stock, you agree with Mr. Cundy, your foreman, that all these are additions to the original rolling stock? Mr. Cundy's evidence on that point was not very correct. If you ask me questions independent of Mr. Cundy's evidence I shall be happy to answer you.

219. Well, there is a long list of this rolling stock: is it not a fact that every item of these was additions to your rolling stock, as in contradistinction to substitution?—that seems to be what Mr. Cundy says, and he is not likely to go wrong about it, I think? I should like to see that list. I cannot tell you unless I have the particulars before me.

[List handed to the witness.]

220. What are you looking at? The last two items.

221. Are those prepared by yourself? Yes.

222. Now, may it not be taken that they were additions to the original stock—necessary additions? The whole lot were additions. They were temporary additions.

223. Now, I would ask—I will pass on to another matter. I do not know if it is formally on Your Honor's notes. I asked the question when this railway was opened for traffic, and the witness said on the 1st of November, 1876.

Witness.—On the 15th of March it was opened through to Launceston.

His Honor.—I do not know that I have it on my notes, but the first ticket was issued for Launceston, and was taken by myself, on the morning of the 18th October, 1876.

Mr. Miller.—It was opened during the time the line was in course of construction, Your Honor.

His Honor.—I cannot say about that, but I certainly took the first ticket from Hobart to Launceston.

224. *Dr. Madden.*—Well, we will take that to be it, Your Honor. All I know is it was opened some time in 1876. Now, originally your company was established with a capital of a million, was it not? No.

225. Was not that so?

His Honor.—Would not the articles of association show that?

Dr. Madden.—They would, Your Honor. I am getting at that.

Mr. Fooks.—You objected to their being put in.

Dr. Madden.—I know I did.

226. Well, Mr. Grant, what was the original share capital? A million pounds.

227. The Company is registered both in England under the Companies Act and under the Companies Act in Tasmania? Yes.

228. And you had borrowing powers? Yes, of £100,000.

229. Did the shareholders assent to the borrowing powers? I believe so.

230. I believe you have called all your capital except £450,000—there is £45,157 uncalled—I mean by that your subscribed and loan capital? I can answer on the prepared statement, but not of my own knowledge.

231. That is a very good rule. I am speaking from the same thing. Now, does not this £45,000 represent the total of uncalled capital?

Mr. Miller.—He cannot have any knowledge, except by hearsay.

His Honor.—You, in re-examination, can clear up all that, Mr. Miller.

Mr. Miller.—Just so, your Honor.

Mr. Fooks.—I knew that it must come to this some time or other, in spite of your objections.

232. *Dr. Madden.*—All things come to those who wait. It is very gratifying to see the realisation of our hopes after waiting patiently for them. Now, Mr. Grant, if you look at the balance sheet, No. 7, you will see that on the 31st December the balance at the credit of the Company is £45,157? That would be share capital.

233. But this purports to be a statement of receipts and expenditure, and being so, unless that money has been got rid of, you have it now? Yes.

Mr. Fooks.—It is not capital for this undertaking.

Dr. Madden.—Not capital for this undertaking, eh? Capital is capital.

Mr. Fooks.—I know capital is capital, but my friend, I fear, would not be prepared to take his fee out of that capital. We have no unexpended capital.

234. *Dr. Madden (resuming cross-examination.)*—I believe at one period your Company fell into arrears in the payment of the interest due to the bondholders who had advanced this £650,000? Yes, through the Government not paying the interest when due.

235. And the result was that you made a bargain with your creditors by which they were to accept a reduced rate of interest—4 per cent. instead of the 5 per cent. originally bargained for—and that you issued debentures for that amount? Yes.

236. The result was you were practically in Queer-street, as it is called, and could not meet your engagements? No.

237. You had to ask time; and this interest was funded to secure your creditors. Well, I believe you appointed trustees to look after this—to administer those particular debentures? Yes.

238. And those are the trustees to whom you have paid this money which the Government object to? Yes.

239. For a time they got nothing for their services? No.

240. And then in a lump sum you voted them this amount? Yes.

241. And now you seek to pay this out of the pocket of the Government, saying we have only one means of paying it, that is, out of the profits of the concern? Not out of the profits. We have had no profits declared. It is an item of expenditure under the contract.

242. And when you presented this item to the Colonial Auditor, the Government objected to pay it? Yes, they did.

243. Well, now, you have stated that the Government treated the Company with great harshness in this matter. Now I ask you, did not the Government act throughout towards you with the greatest consideration, and did they not even advance you money when they could safely do so, after making a protest respecting the items? Well, they did not pay.

244. Of course not; but did not the Government pay you all the money they could pay consistently with their claim? I have no complaint against the Government except that they did not pay. (Laughter.)

245. That may be a complaint, but whether it is a well grounded one is another matter. Now, having left that general topic, let us come to another one. You said in your examination-in-chief that no complaints were made by the Government prior to 1882? I said there were complaints made.

246. No exception was made to the charges on this account? No.

247. Now, did you not in the years from 1877 to 1882 charge items of an exactly similar character to those in this controversy to a construction account? Partly, and partly not.

248. Did you in 1887 charge items to the amount of £6548 18*s.* 9*d.* to a construction account? Possibly I did.

249. And in 1878 a sum of £19,637 9*s.* 3*d.* ? Very likely.

250. And in 1879, £12,434 9*s.* 7*d.* ? Possibly.

251. And in 1880, £78 1*s.* 2*d.* ? Yes, but I can account for this.

252. And in 1881, £76,674 4*s.* 9*d.* ? I know nothing of that. I can give no evidence on this item of seventy thousand odd. It was an adjustment made in London.

253. What was your difficulty ? It was adjusted in London, but the other items were occasioned by the delays of the lawyers in carrying out the conveyances.

254. This Company has made profits ? No, they have not.

255. But there is a sum of £447 4*s.* in this balance of expenditure and receipts? It was not a balance of profit, although it was deducted from the amount for interest.

256. There was a balance on a statement of revenue and expenditure, a credit balance of this amount, which you therein call profits. If they were not profits, why did you call them so ? If I did so, I did not consider them so.

257. You remember the item I speak of. Did you allow them to deduct it as being profit from the interest ? No, I deducted it myself in sending in the account.

258. That is much better so. Then you deducted it as the profits spoken of under the contract ? I drew it out as a balance on an abstract to be borne by the contract. It never was a profit.

259. It is funny you parted with that so easily. There was another £68 odd which was placed in another balance to the credit of this abstract of revenue and expenditure. You again deducted this in favour of the Government ? Yes, but I made a mistake in that.

260. In your dealings with the Government you never raised this contention about profits till you got here and heard your counsel, who has been brought all the way from England to expound this theory, use it ? I did not at the first beginning of the controversy, but I did afterwards, and I was overruled.

261. You were overruled, and you yielded ? Yes, I yielded.

262. In stating your accounts you have followed that principle ? I have ; I never did recede from it; it was my Directors who did so. I never believed it to be otherwise.

263. Well, now, about this £45,000 you speak of. It is difficult, I know, to keep these things in place ; and I asked you those other questions because it was more convenient to take them so, but now on this balance sheet I find, if you will look at item No. 4—

Mr. Miller.—Would it be convenient for you to give the date ?

Dr. Madden.—The date is the same, 1876. First of all, you will observe it deals with capital of all sorts, which is detailed, and the total is £1,800,000. Well, look at item No. 4, which purports to show the total capital received as £1,233,573 ; and if you look at the columns opposite you will see the total expenditure is £1,188,315, so that the £45,157 is a balance between the total capital received and the total capital expended ? Quite true.

264. So that it is a balance of actually received capital—actually realised capital; that is plain, is it not ? I do not know how it arises, but, stated broadly, it may be so.

265. Stated longly or broadly it is all the same. I read the whole thing, and it is, to all intents and purposes, a credit balance of capital in hand. It may appear to be.

266. Well, those are your own figures, so that if your figures are correct they have a correct balance, and that shows that sum of £45,000 odd as being in hand—capital unused ? I suppose so.

Mr. Miller.—That is the balance sheet presented to the shareholders ; it is not the balance rendered here. I do not want the jury to be misled.

Dr. Madden.—I do not mind whether it is a balance sheet presented to your shareholders or not ; it is, to all intents and purposes, a balance sheet of the capital of the Company. I will read it.

Mr. Fooks.—You can read the whole of it.

Witness.—Prior to 1882 it was a fluctuating item, but since then it has been continued at that amount.

267. *Dr. Madden.*—I suppose you are aware that there is such a publication as Bradshaw's Manual of Railways ? I believe so.

268. Now I find in the issue of that Guide for 1889 that the same amount is brought forward in the balance sheet of your Company.

Mr. Miller.—That is not evidence.

Dr. Madden.—Perhaps it is not evidence, yet Bradshaw's is a well known authentic publication, and the fact is that in Bradshaw it is brought forward, and shows that, up to the latest date of the issue of a balance sheet, there was this balance.

Witness.—It is not available capital.

Dr. Madden.—They say it is.

Mr. Miller.—No.

269. *Dr. Madden* (resuming).—Have you got the latest one ? Yes.

270. Give it to me, please (balance sheet handed to counsel.) Do you know anything to the contrary of its being a cash balance ? I know it is not.

271. In 1886 it is quite certain it was a cash balance ? I believe the amount represented in the balance sheet is for shares of the Company which are of little value.

Dr. Madden.—It is a balance of capital received, it is not shares. It is a statement of your capital account.

Mr. Fooks.—It is a statement of shares and capital revenue.

Dr. Madden.—I put in that balance sheet if your Honor pleases.

Mr. Fooks.—May it please Your Honor, I do not think I shall finish with Mr. Grant to-day. Will Your Honor please to adjourn.

His Honor.—I think the examination may be concluded.

Mr. Fooks.—I think not, your Honor.

His Honor.—We will go on and finish this witness, Mr. Fooks. I said that we would do this, Mr. Fooks.

Mr. Fooks.—Very good, your Honor.

272. *Re-examination proceeded with by Mr. Fooks.*—You are asked by my learned friend about that

letter of the 24th September, 1884. Did you answer that letter?—did you reply to the Treasurer's letter? Yes. I have it here.

Mr. Miller.—Then we put in the letter of the 24th September sent by the witness to the Chief Secretary. My friend has suggested, your Honor, that to save his voice I shall read it.

His Honor.—Certainly; by all means.

[Letter read by Mr. Miller.]

Tasmanian Main Line Railway Company, Limited,
General Manager's Office, Hobart, 24th September, 1884.

SIR,

I HAVE the honor to acknowledge the receipt of your letter, dated the 16th instant, in which you inform me of a report by the Colonial Auditor that in the year 1883 a large expenditure was incurred by the Tasmanian Main Line Railway Company, Limited, to which exception might be taken as to whether such should be a charge against the revenue of the year.

The expenditure in question is specified in a schedule, of which you enclose a copy, and state that the Engineer-in-Chief has minuted the original to the effect that all the items are chargeable to construction, rather than working expenses, except the replacement of a building destroyed by fire.

You further remark, that should the Company continue to make alterations and additions at their discretion, the Colony might never derive any pecuniary benefit from the increased traffic, as contemplated in the Contract, between them; and that it is therefore necessary for the Government to have power to prevent the appropriation of revenue to objects not contemplated by the contract.

On the presumption that the above expenditure, amounting to £5863 18*s.* 9*d.*, has been improperly charged to maintenance, you desire to be informed how the Company will repay the sum to the Government.

I trust you will pardon my repetition of your contentions, in order to make my replies quite clear. The subject is one of great importance, and necessitates a detailed answer, which I commence by referring to the said terms of the contract.

Clause 7 states—"The Company shall construct, maintain, and work a Main Line of Railway."

Clause 5 states—"The Governor hereby especially guarantees to the Company interest at the rate of 5 per cent. per annum upon the money actually expended in the construction of the railway, up to and not exceeding the sum of £650,000."

Clause 6 states—"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."

Clause 16 states—"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 efficient repair and working condition."

Clauses 7, 8, 9, 10, and 11 prescribe that "The Company shall furnish quarterly an abstract of their receipts and expenditure for the preceding quarter; that any account not adjusted by the Company in one quarter can be subsequently brought into account, and that the Company shall provide satisfactory evidence of all the payments made by them, which may be audited, so that the abstract rendered be checked."

It is therefore apparent that the whole responsibility rests upon the Company alone of providing every necessary facility for the efficient working of the railway, and it is left to their judgment to decide upon the reasonable sufficiency of the accommodation that should be from time to time provided, or as to any additions to or deductions therefrom.

The cost of the whole undertaking was estimated under the contract not to exceed £650,000, including the allowance in Clause 7 of £25,000 for preliminary expenses: but the Colonial Auditor duly certified on the 16th January, 1879, that up to the 20th June, 1876, the Company's expenditure had amounted to £714,854 1*s.* 7*d.*, and that a considerable amount had been expended for construction since that date; this is proved by the published accounts of the Company. It has often been alleged against the Company—from uninformed sources—that they had improved the Railway and rolling stock to its present position out of revenue. There is, however, no foundation whatever for such statements, because all the principal improvements, both of line and rolling stock, were paid for out of the proceeds of the new capital of £100,000 raised long after the railway was regularly opened for traffic, while a further sum of £34,994 2*s.*, being the balance of expenditure over receipts, was abandoned as a claim against the Government in the final settlement of October, 1882, and was therefore lost to the Company, but gained by the Colony in the improved state of the railway.

In my official correspondence with the Government throughout a long period, I have frequently called attention to the fact that the Contract makes no provision whatever for a capital account, to which any necessary outlay could be charged, and that the Company have no means of raising additional capital; further, that the benefit of any outlay must—at least for many years to come—accrue to the colony alone, there being twenty-two years unexpired of the contract. You will also observe that clauses 8 to 11 of the contract permit of no distinction whatever between vouchers for payments which to some might seem chargeable to a "capital," and by others to "revenue" account; and must therefore apply solely to the condition in the 6th clause, that the line shall be worked in an efficient manner and all sufficient accomodation be given. I am unable to perceive how any such opinion, as given by the Engineer-in-Chief, can be made applicable to what is purely a railway manager's question, affecting the safe and proper working of the line.

The various reports of the Engineer-in-Chief, and the deed of mutual release dated the 23rd February, 1883, being evidence of the sufficiency of the line at the close of 1882, I venture to submit that any subsequent expenditure can only be impeached as to its *bonâ fide* character in not being a reasonable requirement for the efficient working of the undertaking.

No notice has hitherto been given to the Company that the Government desire a limitation of the terms of the agreement entered into under my letter of the 13th October, 1882, and the acceptance thereof by the Hon. the Premier on the following date, under which, on condition of the Company surrendering their claim of £28,258 10*s.* 2*d.*, and costs, for which they were suing; also, £34,994 2*s.*, balance of loss on working account, or a total of £63,252 12*s.* 2*d.*, in consideration of a payment of £14,654 0*s.* 10*d.*, and the further proviso that the accounts of the Company should be adjusted, and the true balance of profit and loss struck yearly "*after a proper allowance has been made towards a renewal fund, both for the line and rolling-stock*" [these words are in italics, Your Honor], and it is not probable that the Colony would gain by restricting the Company's application of these terms. The Contract having permitted the use of timber buildings, bridges, and culverts, it is certain that such works have a much restricted limit of duration, and each year become increasingly deteriorated in value.

In making up the accounts, therefore, for 1883, the Company is entitled to put aside a very considerable sum towards a reserve fund, both for the line, works, and rolling-stock; but as the best possible investment of this fund must be improving and increasing the earning capabilities of the property, I venture to submit that the total amount questioned by the Auditor is less than the Company are equitably entitled to reserve, and that they have acted judiciously in its investment.

The Government might possibly have grounds for apprehension that the Company may absorb the whole of any surplus revenue in improving the line to an unnecessary extent, and beyond the requirements of the Colony; seeing that but a small part of the surplus of £10,000 I anticipated as the surplus of this year's working will now be available in reduction of the guaranteed interest, had it not been already explained that the loss of this estimated surplus is accounted for by the traffic receipts being so much below the estimated amount.

It has not been imputed that the expenditure now questioned was not imperatively required for, and made wholly in the interest of the Colony, since the Company would equally have received their guaranteed interest had not one farthing been expended; but, both in general convenience and in saving of current expenses, the Colony is benefited.

The Company are most anxious to act loyally with the Colony in fulfilling the contract; and its Directors have continuously urged upon me to reduce the expenditure in every department to the lowest possible point consistent with efficiency, so that the charge upon the colonial resources might be lessened, and that the railway proprietors (of whom three sections thereof have never received any interest whatever) might see a prospect of the operation of the first portion of Clause 13, under which "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 (£650,000), the Company is to retain all such profits;" and the continuing portion of the clause, wherein, after a moiety of the profits exceeding six per cent. has sufficed to pay off the amount paid by the Government for guaranteed interest, the whole of the profits obtained from working the line belong exclusively to the Company.

It is not therefore probable that any unnecessary expenditure will be incurred; but so anxious are my directors to ensure this, that I do not doubt they will be willing to enter into a mutual arrangement with the Government having for its object the prevention of any appropriation of revenue to objects not contemplated in the contract.

In the official Report of the Railways of Natal, Cape of Good Hope, for the year 1883, I notice that the annual revenue account is regularly charged with large sums under the following headings:—

Houses for platelayers and other staff.
New buildings and alterations, workshops, stores, &c.
New machinery and erection, tools, &c.
New sidings, and enlargement of yards.
Additional water supply.
New rolling-stock.
New gates and crossings, platforms, signals, &c.,—

being similar to the requirements of the Main Line Railway.

By the Orient mail just delivered, I have received the Report of the Directors of the London and North-Western Railway of England (a purely private undertaking), which is, I believe, the largest single system of railway communication in the world, in which it is stated that in the half-year ending the 31st December, 1883, the Company had, from revenue receipts only, renewed 126 miles of single road permanent way.—"In the locomotive department they had in the half-year paid out of revenue for 35 entirely new engines; they had renewed 59 with new boilers, &c.; and they had practically made as good as new 674 engines out of the stock. In their carriage and waggon department they had put on the line 95 new carriages and 282 new waggons; while 770 waggons had been made entirely new, except as regards wheels and axles. They had lost the s.s. *Holyhead;* and as she had been charged to capital account, they had been obliged to replace the whole £35,000" out of the revenue account, but hoped, if they had no casualty this year, it would be redeemed.

Similar quotations to the above can be obtained as to the practice of the various Governments and Railway Companies throughout the world, since their reports are always made public. I trust, therefore, it has been proved to your satisfaction that the principle adopted by the Main Line Railway Company coincides with the uniform practice in the management of all such undertakings, and that the Company are deserving of your full confidence.

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

Hon. ADYE DOUGLAS, *M.L.C., Premier and Chief Secretary.* C. H. GRANT.

Mr. Fooks.—And now read the answer from Mr. Adye Douglas.

Mr. Miller.—I did not bargain to read the whole of the correspondence, but merely this somewhat lengthy letter to save Mr. Fooks's voice, but I suppose if I am to read it I must read it, that is all. I ask my friend to take it as accepted. It is a letter from Mr. Adye Douglas.

His Honor.—You can read the portions of it which are clearly applicable to your case, Mr. Miller.

Mr. Miller.—Certainly. The first portion of it would hardly be foreign. But as it is a very short letter I will read the whole of it.

Chief Secretary's Office, Hobart, 3rd October, 1884.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of the 24th ultimo, which has been duly considered. I need not follow the various matters contained therein.

It is sufficient for the purposes of the Government to refer to the last paragraph in page 10, wherein you state, "It is not, therefore, probable that any unnecessary expenditure will be incurred; but so anxious are my Directors to ensure this, that I do not doubt they will be willing to enter into a mutual arrangement with the Government having for its object the prevention of any appropriation of revenue to objects not contemplated in the contract."

I shall be prepared to enter into arrangements for this purpose, and shall be glad to have your views on the subject; but, in the meantime, it is necessary that the Government take steps to have the question decided at once whether this sum of £5863 18*s.* 9*d.* is fairly charged against revenue.

If you have no offer to make, I shall be compelled to advise the Treasurer not to pay the full claim for interest.

Awaiting your reply,

I have, &c.

ADYE DOUGLAS.

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

Mr. Fooks.—The letter of the 7th of October was read, but the explanation was not read. Some of them were read, but my learned friend stopped short. I do not know that it is necessary, however, to read them.

Dr. Madden.—Are they not the same as the evidence which has been tendered.

Mr. Fooks.—No.

Mr. Miller.—The paper we put in.

Dr. Madden.—Certainly.

Mr. Miller.—We put in these subsequent letters forwarded. We put them in as an exhibit. We will put a copy of this in, and give each of the jury one.

Dr. Madden.—My friend wants to put this into the jury's hands as an exhibit.
The Attorney-General.—Why don't you put in the Parliamentary copy of them.
Mr. Fooks.—It contains everything, I suppose?
The Attorney-General.—Yes.
Mr. Fooks.—Very well, then.
His Honor.—If you put this into the jury's hands as evidence it will hardly be a fair way.
Mr. Fooks.—I do not see this letter of the 13th October, 1884; you read it, I know.
Mr. Miller.—Somebody read it, any way.
Mr. Fooks.—Not the 13th October, 1884. Let them all go in.
Mr. Miller.—That should be read, Your Honor. I mean the answer to the letter. This will be the answer to the letter of the 13th, the letter from Mr. Adye Douglas. I will read it.

Tasmanian Main Line Railway Company, Limited,
General Manager's Office, Hobart, 14th October, 1884.

SIR,

I HAVE the honor to forward you herewith an Abstract of the Traffic Receipts and Expenditure of the Tasmanian Main Line Railway Company, Limited, so far as they can be made up in this Colony, for the quarter ending the 30th September last.

It is with regret I have to observe that, although the revenue receipts of the quarter amount to £14,946 0*s.* 8*d.*, the expenses have increased to £19,134 8*s.* 2*d.*, leaving, therefore, a debit balance against the working account of the year of £4820 7*s.*

The principal items of increased expenditure are, however, of an exceptional character, and such as, I trust, will not occur again to the same extent.

Although the operations of the current year have failed to fulfil my predictions from causes which have been fully explained, I see no reason to doubt that the year 1885 will be the first of a series that will show an ever-increasing balance to the credit of the revenue, and a corresponding reduction of the liability of the Colony.

The full amount of the guaranteed interest for the past quarter being due to this Company, I enclose an account for Eight thousand one hundred and twenty-five Pounds, to which I have added the balance of previous accounts now owing to the Company. I shall feel obliged by your directing the payment of these amounts, in accordance with the conditions of the contract.

I have, &c.
C. H. GRANT.

Hon. W. BURGESS, *M.H.A., Treasurer.*

Mr. Fooks.—And the correspondence upon the Report of Mr. Speight. That Report was read. I made no objection. This Report had not been understood by Mr. Grant, but correspondence has been raised by that.

His Honor.—Have you considered how much this is likely to influence the jury's mind as to the question of what is cost and maintenance, Mr. Fooks? Is it likely to affect that question, which is the only one before them?

Mr. Fooks.—I am very much of that mind myself, Your Honor. I am very much of that opinion. But the jury are likely to be prejudiced by Mr. Speight's Report, and this is entitled to consideration, if you will allow it to go in, Your Honor.

His Honor.—You can put it in without reading it now.

Mr. Fooks.—Very well, Your Honor.

Mr. Miller.—Our letter, Your Honor, I think, might be read. It is not a long letter, fortunately.

Tasmanian Main Line Railway Company, Limited,
General Manager's Office, Hobart, 27th May, 1885.

SIR,

I HAVE the honor to acknowledge the receipt of your letter dated the 28th ultimo, in which you inform me that the Government having received Mr. Speight's report intend to act thereon, and to deduct £4088 13*s.* 5*d.* from the claim of the Tasmanian Main Line Railway Company, Limited, against the Treasury, on the ground that such sum is due to the Colony on the accounts of the year 1883, as shown by the Colonial Auditor's Report, confirmed by Mr. Speight.

Having had the honor, since the receipt of your letter, of several interviews with the Honourable the Premier and yourself, at each of which I have pointed out that the Government are not adopting the recommendation of Mr. Speight, by which this Company would be saved from most serious inconvenience, but are acting most inequitably in deducting money which was necessarily expended by the Company solely for the benefit of the undertaking, that is, for the advantage of the Colony; and that the Company are neither directly or indirectly financially interested in such outlay.

I must now earnestly protest against the stoppage of any portion of the guaranteed interest, which the accounts of the Company show to be due to them, and of which a portion at least cannot fairly be charged against the Company.

Although a copy of Mr. Speight's Report was sent to my Directors by the first mail after its receipt, there has not yet been time to obtain a reply thereto. I do not, however, apprehend but that the Company would be willing to make an arrangement with the Government on the principles recommended by Mr. Speight, viz., that amount in question for 1883 and 1884, and any future capital expenditure, should be so marked that it could be identified and allowed as a credit when the valuation of the railway on its sale to the Government is made, and that the Company should in future obtain the assent of the Government before incurring expenditure of a "capital" character.

Since the Government have not, up to the present time, informed me of their intention either to consider or to submit to Parliament the equities of the case laid down by Mr. Speight, I am unable to avail myself of your offer to pay a (much reduced) portion of the guaranteed interest, and, as the delay in receiving even this sum must necessarily seriously prejudice the Company, I must earnestly request that a further consideration should be given to the matter, and that I should be assured of the full concurrence of the Government in all the recommendations made by their adviser.

I have, &c.
C. H. GRANT.

Hon. W. H. BURGESS, *M.H.A., Treasurer.*

Mr. Fooks.—Would your Honor adjourn? It is getting very late.

His Honor.—We will finish this portion of the case to-day, Mr. Fooks. You cannot have much more to ask this witness, and I would prefer to close the case for the one side to-night.

Mr. Fooks.—I propose now to have the Memorandum of Articles of Association.

Dr. Madden.—They are admitted.

273. *Mr. Fooks* (to the witness).—Now about this £45,000. My friend represents it as being a cash

balance. In the reports as I understood you, you do not, or do you, admit that that represents cash in the hands of the Company? I am instructed by my Directors to say that it is not cash unexpended.

Dr. Madden.—I do not know what he means by "my Directors."

Mr. Fooks.—I understand it is the whole of their capital.

Dr. Madden.—There it is in the balance sheet, and it purports to be cash.

Mr. Fooks.—It does not, and I object to your saying so.

His Honor.—Dr. Madden says it is, and you say it is not. It is as six of one and half a dozen of the other. Now, you ask Mr. Grant what he says it is.

Mr. Fooks.—No, I ask him if the sum represents cash.

Dr. Madden.—I object to Mr. Grant's saying it is so and so, or that he is instructed that it is such and such a thing.

Mr. Fooks.—I ask do you think it is cash? It is not cash.

Mr. Fooks.—Does that apply to all these reports that have been published by the Company? Yes.

Mr. Fooks.—There is some abstract, your Honor, suggested regarding the mail contract, and it was stated there was an arrangement for a subsidy at a certain period. That was why it did not appear.

His Honor.—Mr. Ellis mentioned that. Mr. Grant has not been examined on that—it would be altogether new. What was that way-leave for the use of which the Government paid the Company £100 a year?

Mr. Miller.—That was not in the contract, and the Company were entitled to the full benefit of that. I should like Your Honor to ask him, as regards the refreshment bars, were the whole of the receipts of these credited to the Government?

Mr. Fooks.—But it appears upon the abstract they have had the benefit of the whole of the receipts.

Dr. Madden.—It is something not raised in the pleading.

His Honor.—There is no question of this raised upon the pleading.

Mr. Miller.—No. It is to show the conduct of the Company towards the Government. I wished to show they had given every benefit possible to the advantage of the Government.

His Honor.—We are not trying a question of bad conduct or good conduct towards the Government at all, but upon the general issues.

Mr. Fooks.—That is all I have to ask you, Mr. Grant.

Mr. Miller.—Will your Honor adjourn till Saturday?

His Honor.—To-morrow we sit in *Banco*, Mr. Miller.

Mr. Miller.—What time, then, on Saturday will your Honor sit. I presume 10·30.

His Honor.—As convenient to you, gentlemen. I should like to push on the case. I could sit to-morrow afternoon if you think anything is to be gained by it, or if any of you gentlemen think any purpose is to be served by so doing.

Dr. Madden.—Do I understand your Honor that the plaintiff's case is closed?

Mr. Fooks.—I think it is. I do not anticipate having to offer anything further beyond putting in certain documents, or unless anything substantial should arise in the meantime. I think I may say it is closed.

His Honor.—Of course if anything substantial arises, your are at liberty to introduce it in the case, or if you have any documents to be put in. Then we will sit again at 10·30 on Saturday.

Court adjourned till 10·30 A.M. on Saturday, May 11.

Saturday, 11th May, 1889.

The Court met at 10·30 A.M.

Mr. Fooks said: I consider it my duty, before we proceed to the ordinary business in this cause, to call your Lordship's attention to certain articles which have appeared in the *The Mercury*.

His Honor.—When did they appear?

Mr. Fooks.—Last Wednesday, and another this morning. I consider these are eminently calculated to influence the jury and to prejudice them against one of the litigant parties, namely, the plaintiffs in the case. Now, I hold that nothing of that sort ought to be done nor comments made, especially while a case is *sub judice*, if it would tend to influence a jury. I do not care about it myself, though it might be supposed that as my name is mentioned I draw attention to the matter because I am hurt. As far as I am concerned I say the article is untrue, misleading, and very impertinent on the part of the magnificent "we," who is I presume the editor of the journal. It is this:—"It is gratifying to find that Mr. Fooks, Q.C., in addressing the Court yesterday in the case of the Main Line Railway Company *versus* the Government, said that 'he had every confidence in the justice which would be administered.' If we remember rightly he expressed a somewhat different opinion not many years ago, in fact, held that the Company could hardly obtain justice in this Colony. We remember that we pointed out at the time that this was both an unwarranted and foolish insinuation, as it was probable that the Company would have to plead the case before the Supreme Court here." Such a statement never did take place, and I am quite certain nobody either in England or the Colony ever heard any suggestion from me that the Company could not get justice in Tasmania. The article is calculated to lead the jury to think that when I expressed confidence in them I did not mean what I said. The next paragraph appears in to-day's issue, as follows:—"We are requested to state that Mr. Fooks, Q.C., denies that he ever made any reflections on the administration of justice in this Colony in connection with the Main Line Railway. The statement to which we referred was made some years ago, and commented on by us, but we have not had time to search our files for the particular passage referred to. In the meantime we give the denial as a matter of justice to Mr. Fooks." There is a repetition of the fact. I am not going to ask that this party be committed, but I do think it calls for some expression of opinion from your Lordship that there must not be comments of this kind.

His Honor said, I am quite satisfied that the jury will not be in the least influenced or prejudiced by the articles read. I cannot suppose the possibility of their being so influenced after hearing your comments on the matter. Is your case closed?

Mr. Fooks.—No; I wish to call one more witness, Mr. Audley Coote.

Mr. Miller said Mr. Grant, in his examination, stated that the greater portion of the gatekeepers' cottages were replacements of other cottages. Dr. Madden very properly pressed him to give instances, and Mr. Grant said he could not from memory do so, but Mr. Nairn, who is the Superintendent Engineer now, can supply the information if allowed to be re-called. He was not asked the question during his former examination. There is another point also, your Honor: towards the end of a long day, Mr. Grant's cross-examination ceased, and I am not quite sure whether he gave a complete explanation as to some of the entries and the amount of capital remaining to the credit of the Company.

MR. CHARLES CAMERON NAIRN *was then re-called in and examined by Mr.* MILLER.

1. You have already been sworn? Yes.
2. When these gatekeepers' houses were erected, you were superintending engineer? Yes.

His Honor.—How many of these were in place of old buildings? I can recall about five of the lodges actually renewals in place of old lodges.

Mr. Miller.—I have a list of new lodges here. The witness has said he remembers five.

3. *To Witness*—Can you say positively whether there were not more than five? I cannot swear there were more, but I believe so.
4. Bilton's; was that one? Yes.
5. Fourteen-mile gate? Yes.
6. Coombes' Mill? Yes.
7. Snake Banks? Yes.
8. Flat-top? Yes.
9. Evandale Station? I will not be certain about that.
10. Mile Road? Yes.
11. Conara? I am not sure.

Mr. Miller.—That is six he is certain of.

12. *Cross-examined by Dr. Madden.*—Would that about substantially represent the probable number of renewals? No, I think not. I think there were more.
13. Now, how many do you think there were: give yourself a margin? Well, it is difficult to say.
14. Well, you have had time, 48 hours, to refresh your memory. Do you mean to say that your memory is so short that you do not recollect that when you were asked to suggest any cottages that were renewals you did not at first say "I cannot say," and then that Rosetta Cottage was one? Yes.
15. And when you were asked the year in which it was burnt down, you could not say? Yes.
16. You are positive now about these six. Will you positively swear there were more than six? I am not going to swear anything of the sort. I think the whole fifteen might have been.
17. I ask you to say how many renewals you will swear to? Six.
18. You will not swear there were any more?
19. *Mr. Miller.*—That is because you have not gone into the others? Yes.
20. *His Honor.*—Are we to understand that when fifteen were charged, you only took the trouble to look up six? No; I have looked through them all, but I can only swear to the six. All that I would like to swear to.
21. *Mr. Miller.*—Within what time have you made the examination?
22. *Dr. Madden.*—You have looked through all the huts referred to in these particulars? I think so; those relating to 1883 and 1884.
23. Is the gatekeeper's lodge at Austin's Ferry a renewal or a new work? No, it is a new one.
24. Wilson's lodge? That is also for a new purpose.
25. Can you tell me the average value of these huts? Well, I cannot do that very well, because they vary very much. Some are two rooms and some are three.

MR. AUDLEY COOTE *was then called and examined by Mr.* FOOKS.

1. You have been a resident of Tasmania for some years? Yes.
2. And you are now, and have been for some time, a Member of the Legislative Council of the Colony? Yes.
3. Are you acquainted with the Tasmanian Main Line Railway Act—the first Act, I mean? Yes.
4. Are you acquainted with the second Act? Yes.
5. I am asking you to speak from your own knowledge as a Member of the Legislature. Are you aware there was a Government Commission before the Act of Parliament having reference to the railway? Yes.
6. You have seen that report, I suppose? Yes.
7. It is a Parliamentary paper open to the whole public? Yes.
8. You have seen it, I suppose, a great many times? Oh, yes, I have seen it.

Now, I am not going to ask you the contents of it, but I hand you up a paper which appears to be a copy of that report.

His Honor.—What has that to do with the case?

Mr. Fooks.—I am quite aware that Your Honor has ruled that the contents of the report are not evidence, but I want the fact of the existence of the report admitted. I do not think it would be fair to Your Honor to regard your decision as final in this matter. It is not too late to alter it. This case may go further, and they may say to me, did you do all you could to get the document admitted as evidence?

Dr. Madden said he was quite willing to admit that Mr. Fooks had used every effort to obtain the admission of the report of the Royal Commission as evidence, and that an objection had been taken by counsel for the defendants.

His Honor said he held that the proof of existence of that which he held to be irrelevant was also irrelevant. He held that the report itself was irrelevant, and therefore that evidence proving the fact that a report was made was also irrelevant.

Examination continued.

9. *Mr. Fooks.*—Did you after that first Act was obtained go to England to negotiate the formation of a company to make a line of railway? Yes.

10. Did you take that report with you? I did.

11. Did you use that report for the purpose of your negotiations for the formation of the Company? I did.

12. Were these negotiations effectual in forming the company?

His Honor.—A contract has been made, and by that contract the parties are bound, and I am not prepared to go behind that contract.

Mr. Fooks.—Then the question I ask, whether the report was used for the purpose of negotiation, you rule to be immaterial?

His Honor.—I do.

Mr. Miller.—Does Your Honor not think that in view of what has been said that the precise question objected to should appear on Your Honor's notes.

13. *Mr. Fooks* (resuming.)—After having gone to England and negotiating did you return to this Colony before the passing of the second Act? I did.

14. Now, then, I must ask you this. Did you make any communication to the then Members of the Government respecting the result of the negotiations?

Dr. Madden.—Well, I object to this, Your Honor.

Mr. Fooks repeated the question.

Dr. Madden.—I object to the question, most emphatically.

His Honor.—I look upon that as going behind the contract again.

22. *Mr. Fooks* (resuming.)—After your return to the Colony the first Act was passed? Yes.

22. Had you not some correspondence with Sir James Wilson on the subject of this Main Line Railway case? Yes.

Dr. Madden said it seemed a pity to waste time in bringing evidence unobjectionable in itself, but which led up to evidence which could not be received.

His Honor said, I cannot see what relevancy this evidence can have to the question of maintenance and construction, which is the sole question before the jury.

Mr. Fooks.—I understand that you rule I am not to call as evidence the letter from Sir James Wilson having reference to the contract subsequent to the passing of both Acts.

His Honor said the letter written by Sir James Wilson was a purely private communication, and that he had no authority to deal with the matter as a Member of the Government.

Mr. Miller said it was a contention in the course of the case that maintenance and working might have a technical meaning; if so, that would be explainable by the opinion of experts; but it was also asserted by the T. M. L. R. Company that they had no technical meaning—they were plain English terms, and unambiguous. But there was a second contention, that if the parties, at the time they were introducing these words into the contract, agreed between themselves as to the sense in which they were to be used, it was at all events arguable that the means whereby they arrived at the conclusion should be receivable as evidence.

His Honor said the terms maintenance and working had already been accepted as having their ordinary meaning.

Mr. Fooks.—Then, if that definition is accepted, this evidence need not be given. It would be simply idle evidence.

His Honor.—Does this close the case?

Mr. Fooks.—If Your Honor pleases. That is our case.

Dr. Madden.—May I trouble Your Honor to read your notes of Mr. Grant's evidence in chief, the first part of it?

His Honor said Mr. Grant told us he was a Civil Engineer, and had been manager of railways for several years, here and in America, and came to Tasmania to carry out the contract involving the expenditure of £1,050,000. A sum of £100,000 was raised after the completion of the line. He furnished the Government with quarterly abstracts of receipts and expenditure, and up to the present time no objection had been raised as to the form in which these accounts were rendered. Before the Disputes Act no items had been objected to as wrongly included. The Government Auditor audited the accounts. All the items were necessary expenditure for maintaining the railway in good working order. The new store could not be done without. A new engine was also required, and a large saving had been effected. There had been an economy in fuel. The work could not have been carried out without a fresh engine. The old engine was sold for £210, and a new one bought for £150. In the erection of the carpenters' shop the labour was new, but the materials were old. The erection of a porch was a necessity. Coming to the lodges, many existed when the line was taken over.

Dr. Madden.—Thank you, Your Honor. If Your Honor pleases—

Mr. Fooks said in his address he had not referred to the cottages, and he was very anxious that his learned friend should have the authorities upon which he relied in this matter, and also as to what was included in profits.

His Honor said it was unusual to interrupt a counsel for the other side in his address.

Dr. Madden said if the object of his learned friend was to assist him, he would have no objection to hand the authorities to his colleague, Mr. M'Intyre, for perusal.

Mr. Fooks said he was quite willing to do so.

Dr. Madden then made an application to be allowed to amend the second plea by paying into Court a sum of £640—£600 to cover the wildest and most extravagant estimate for erection of gatekeepers' lodges, and £40 to cover the item in the Hobart yard, which was suggested to constitute a renewal. His Honor had reiterated from the Bench that the real question at issue was to decide between "new" and "renewal," and had already seen in evidence that as far back as 1884 Mr. Grant was asked to give the Government a list of items which were of new construction, and Mr. Grant now said he did not then understand what was meant. But this was met by the letter from Mr. Adye Douglas in September, 1884, explaining precisely what was meant, and giving a list of the items to which exception was taken, headed "Expenditure during 1883 on works (not being renewals) that did not exist in 1882." Therefore, the other side must have been perfectly aware of what was in question. When the first application was made, more than a week ago, no suggestion was then made that these huts were renewals. It was left as admitted that these were new, and not renewals. The Court had the power to amend the plea so as to raise the true issue between the parties. The question was, whether or not the Government were chargeable with matter that were new works. A very great deal might be said to induce the Jury to believe that these buildings were really not renewals in the true sense of the word; but he did not intend to burden the case with this, so he asked to be allowed to pay this £640 into the Court.

Mr. Miller said he had no wish to say anything as to the power of the Court to amend the plea, but he ventured to say that an application under these circumstances had never been made in any case he ever heard of; namely, they were seeking by degrees as the case developed, knowing the contentions between the parties, and, after having sternly denied that a farthing was due on any of these works, and pleaded that the plaintiffs were making an unjust claim, they, at the very last stage, asked leave to pay £288 into Court. They now, as the case developed itself, had found new danger, and that their position was untenable, so they asked to be allowed to pay sixpence by sixpence. They now acknowledged this claim to be just to the extent of £288 and £640, nearly £900. They said, "now we will fight them degree by degree, and throw all the responsibility of this fight upon them."

His Honor said the defendants come into Court relying upon the written statement of your Manager that this was a new work. They say you have sprung a surprise upon us, and give evidence from your own Manager to the effect that these are renewals, and we now ask to be placed in the same position as if he had not led us astray.

Mr Miller.—They have had the whole of this correspondence to refer to. Will Your Honor allow me to turn to a letter from the T. M. L. Railway Company's office, dated 27th May, 1885. It states "I must now earnestly protest against the stoppage of any portion of the guaranteed interest which the accounts of the Company show to be due to them, and of which a portion at least cannot fairly be charged against the Company."

His Honor pointed out that the Manager's written statement referred to the works as new and not renewals.

Mr. Miller said it is not fair to take one isolated portion of the correspondence. The portion referred to merely assumes that these are new works, but even under this aspect it is not an assertion that these are new works in the legal application of the words. The letter from Mr. Grant earnestly protesting against the stoppage of guaranteed interest which has been read, was written long before the action.

His Honor read the heading on the items of expenditure "Expenditure—during the year 1883 on works, not being renewals, that did not exist in 1882."

Dr. Madden.—We had a letter with the same heading.

Mr. Miller read the following extract from the Colonial Auditor's Report:—

"5th June, 1884.—Referring to the subject of the conversation held with me yesterday, I have the honor to request you will be so good as to furnish me with a statement of the cost of works during the year 1883 that do not exist in 1882, and specifying the cost of additional carriages and trucks, the prices of which I did not think that it was necessary you should include in the return. Upon further consideration I think it will be desirable also to include this cost, as it cannot be arrived at very exactly in any other way."

He said this is the expression of the Colonial Auditor when commenting thereon, and Mr. Grant uses the same terms. It is a mere quotation of the Auditor's expression, and even were this arguable, how, in view the correspondence, could they have been misled? They have been trying to pay us by sixpences, and though there will always be amendments at any stage of a case, I never heard a case when there should be successive applications for amendments as in the present case. The Government have declared there is not a farthing due to us, and afterwards say—first, that we are entitled to £288, and then £640 more. These, we say, are not new works in the proper sense of the word. All we have said is that, even adopting the expression of the Colonial Auditor, they did not exist before 1882, but they are virtually renewals; and in making an application of this kind—

The Attorney-General.—I believe they consented.

Mr. Ritchie would claim the right, as junior, to say a few words, and he trusted they would consent to the application to amend the pleadings only on payment of costs. He called attention to the second plea, in which the Government declared that they never owed anything at all. There was an absolute denial of every one of the amounts claimed. Then what happened? They came into Court and applied for leave to pay in a sum of £640. That was their application after they had denied owing anything at all. What object could they have but to save the costs on this side? They came after they had every information respecting the claims and after the case had commenced, and he submitted that if this was granted, it could only be granted on payment of costs to the date of the application.

Dr. Madden said when the Government had pleaded never indebted, it had been done in good faith. They had official information that these were new works in the sense in which they were understood by them. They never suspected that part of them, a twopenny halfpenny part of them, would be sprung on them as renewals in this way for the sake of securing costs. They repudiated them at the time on the information given by Mr. Grant; but when Mr. Nairn came and told them that these were actually renewals, then they could only suppose that Mr. Grant had been mistaken. The fact was sprung upon them.

They could not have undertaken to say without information that these were not new works. Mr. Grant had told them they were new works; he might say they ought not to have believed him, but it was not for them to dispute the statement. They asked leave to pay in this amount, and to refuse would be unfair and contrary to every principle of law. His learned friend said he had never heard of such an application being granted, but in the case the Government *v.* Holden it was allowed, and the matters in issue were left to the jury. Notwithstanding the objection of his learned friend, Mr. Ritchie, he believed they were entitled to pay the amount into court now. Regarding the remarks of his friend, Mr. Byron Miller, that it was a matter specially within their knowledge, he denied that. The Colonial Auditor had gone to Mr. Grant, and, in terms of the greatest courtesy, asked for information, and said they had been informed that such and such items were absolutely new, and he asks him to confirm his views. Mr. Grant writes back that they are, principally. He is then asked for a return of those works which he says are new, and this return was furnished. Mr. Douglas had written a letter on the correspondence, asking if this was so, and Mr. Grant replies that he does not for a moment affirm that they are new. They made the application in good faith, and because it was most desirable that the real question should be tried, and that disembarrassed of any trumpery side questions. His learned friend had said they should have costs. They could not have costs then; the costs would, of course, abide the issue, and would be for the taxing master to arrange. That was merely a matter of taxation. He applied now to pay into Court £640 with interest to date, which he had had calculated.

Mr. Miller said the return on which the Government relied was not theirs, but that of the Colonial Auditor—they simply quoted his own expression.

Dr. Madden objected.

Mr. Miller said as to the statement that it was a return of Mr. Grant's, it was no such thing. All Mr. Grant did was to send in his quarterly abstract of receipts and expenditure in writing. The Colonial Auditor in that letter of the 27th May, said that Mr. Grant had said so and so, and, in replying to the Colonial Auditor, Mr. Grant had simply quoted his own expression. It was not their report—they never made such a report; the statement was contrary to fact.

His Honor said they had a letter from Mr. Grant, in which he enclosed a statement of new works constructed during 1883 that did not exist in 1882, and the cost of additional carriages and locomotives provided during the past year. Then they had a subsequent letter and a list from Mr. Grant of expenditure on works (not being renewals) in 1883. He had in his reply in his own letter told them what were new works. The very question raised between the Government and the Company in this action was as to whether these were new works. A list had been sent in by Mr. Grant showing what works were constructed during the year, and the Government relied on that. Evidence was now given that so far from these being new works, they were old works replaced. Certainly as to the store, £40 of the money represented the removal of old fittings from one place to another. The Government had pleaded that these were new works of construction. The question to be decided was, whether these additional works came within the meaning of working expenses. That was the sole question to try. It was admitted in evidence that some ought to be put to working expenses, up to £640, and the Colony now admitted that amount; and those representing the Queen said they would never have disputed this amount but for the representations of Mr. Grant. But for that they would never have pleaded as they had in regard to these items, as their desire was to try the real questions at issue. He thought they should be allowed to pay into Court the £640. He thought all the costs of this issue should be paid by those who put in the plea; but it was important they should decide the cause, if possible, without reference to the side issue of the £640.

Mr. Miller thought in preparing the new Bill the amounts would be limited to the amount paid in on these two specific items.

Dr. Madden could not set it right now, but would be prepared to do so in half an hour after the adjournment. They could either put the whole record in order, or amend the Bill as to the items paid in. He would suggest now that a new Bill be pleaded as to the items paid in, and then raise a separate issue as to the amounts left. He did not care which plan was adopted; but he could be prepared with the Bill in a quarter of an hour after the adjournment.

Mr. Miller.—The Bill can be drawn in five minutes.

His Honor.—Then an order would be made for payment into Court to the extent of £640 and interest. There will be leave to do that, and we will assume that it is done.

Dr. Madden—addressing the Court and Jury—said he appeared with his learned friends, the Hon. Attorney-General and Mr. M'Intyre, on behalf of the Government, that is, the Queen, to place before them as advantageously as he could the contentions which the Government had deemed it right to take up on the matters in dispute in the interests of the people of this country, and to present, for the consideration of the jury on their behalf, the views they had so taken up. He saw before him seven stout-hearted men struggling with adversity. For five hours a day for three days they had listened to the lengthy arguments in the case without getting any very clear understanding of them probably, and when they rose from their pillows that morning, no doubt they had heaved a heavy sigh at the bare idea that they were about to take in another dose of the same kind. He hoped he would not occupy their time or patience to the extent the other side had done—at least he thought not. They were all bad judges as to the time they would probably take up in expounding the matters they had to bring forward; but he would endeavour to keep his remarks within reasonable limits as far as possible, out of consideration for their failings, which, after all, belonged generally to the members of our common humanity. His learned friend, Mr. Fooks, in expounding the case the other day, had become quite fervent in expressing his confidence in the jury, and said he did not believe the members of it could do otherwise than afford the most ample justice to his client, and that, in fact, he looked upon them as most splendid specimens of the human race. This morning he appeared pale with anger at some paragraph which had appeared in a paper suggesting that he had said something at some time against the probability of obtaining justice at the hands of such a jury. His learned friend was an old and experienced practitioner in the courts in England,

and he would not dispute for a moment that he was up to any and every dodge known in *nisi prius*. He had enough experience of that; he therefore expressed his desire to repose the utmost confidence in you as men who would give the foreigner justice. Of course, no one would dare to say that you would not do what was right; but it was not the first time in his experience that counsel had ventured on this line, in the hope that there might be some weak man on the jury who might be tempted to decide according to his vanity instead of in accordance with the law and the facts. There were such, of course, and it might be that when walking down the street they might meet some one who would say, "Ah, yes, of course; it was not likely you would find a verdict against the Colony." His learned friend wanted to make out that he knew them better than that, and that he had every confidence in them. He (Dr. Madden) simply expressed his opinion that they would only give a verdict according to their conscience, as they were sworn to do; that they would not be afraid to walk down the street and receive any comments that might follow their action. Every man—Judge or Juror—who had to give decisions in such circumstances were subject to receive comments of this kind; but it was only weak and foolish people who could suppose that this would affect the administration of justice. They satisfied their consciences when they tried to do right, and he thought they would do right at all events. Of course, his learned friend did not wish to commit the proprietor of this newspaper to the dungeons of the court, but he merely introduced the matter to see what the effect might be. He would now come, once for all, to the questions raised for their decision in this cause. He would take these questions in their chronological order, so that they might be the better understood. At this point, perhaps, they might feel a shudder, remembering the delicious repetitions they had had previously of the letters and correspondence, the Acts of Parliament, the Royal Commission, and other documents, which had about as much to do with this case as the man in the moon. He would say no more about that, but would pass it by. He would pass by all they had heard expounded about maintenance and construction under the contract, and even that fearsome scene when his learned friend, armed with the opinion of Mr. Cyril Dodd, and his friend Sir John Holkar, and himself, had flourished it in his face, and daring him nay, had played Fluellen to his Pistol, and rammed it down his throat.

Mr. Miller desired to correct his learned friend. Mr. Fooks had nothing whatever to do with the opinion.

Dr. Madden thought it unfair for Mr. Miller to interrupt him in this way. If he was wrong it could be corrected at the proper time on his learned leader's side. No doubt he would be liable to make slips, but he thought his learned friend had something to do with the opinion, although he now tried to cry out of it. If he was wrong, it was improper for his friend, Mr. Miller, to come between them, or to interfere in the case, which his learned friend and himself would probably agree the jury were there calmly and dispassionately to try. At all events, it was inconvenient as he went along to be continually reminded of his weaknesses or failings, or his tendency to immoral slips. He would take the documents to which he intended to confine himself in order, and they were these:—First, the original Main Line Railway Construction Act; second, the Contract; and, thirdly, the Main Line Railway Construction Amendment Act. He would ask them now to hear what they had not heard distinctly before, namely, what was really involved in the case. As men of business, no doubt they had gathered something of the issue to be tried in this case; but up to this time it had not been placed before them in a very clear or convenient way. He thought they had, first, to try and remember that the railway was constructed; they had to try and remember also that some time in the year 1876, about the 1st of November or some time in October, it was opened definitely for public and general traffic. From that time it came under the operation of certain clauses of the contract, under which the present dispute now arises. That was the state of matters in the past. From the time of the opening until the year 1884—early in 1884, or it might have been 1883—the railway was carried on and worked without any serious controversy or interference on the part of the Government. There had been other disputes, of course, but they had all been arranged and settled in a satisfactory manner; and up to 1883 there had not been any distinct and definite dispute as to working. In that year the Colonial Auditor, in examining the accounts, was struck by the fact that no matter how the receipts and earnings increased,—no matter how population and traffic progressed,—he found that practically, and side by side with it, up went the expenditure. He found that the expenditure never allowed the receipts to reach up to it; and finding this, he made a special examination of the accounts, and in the interests of the public sought the history of the expenditure charged against the railway; and his mind was struck—as the mind of any common-sense layman would have been—with the idea that the Company was paying for all these things, not out of its private purse, but out of the ordinary revenue of the line: that the Company was paying all this expenditure out of the profits and earnings of the railway. By some means that he had, and looking to the interests of the Government, he found that everything was paid for out of the common revenues of the railway. He then communicated with Mr. Grant in the two letters which had been put in evidence. He would read part of those letters now, so that the jury might see how the matter arose. On 29th August, 1883, Mr. Lovett wrote to Mr. Grant on the examination of accounts to 30th June of that year—"That consequent on observing the exceedingly high ratio of expenditure on account of wages, stores, and upon the expenditure generally, close enquiries were made to ascertain the causes of such high ratio, and a review of former years' accounts was made, not necessarily with a view of objecting to former expenditure, but to enable a comparison to be made." He invited their attention to the friendliness and courtesy which distinguished the correspondence. The Auditor did not impute that the accounts misre-

presented the matter; he did not suggest even that the matter could not be satisfactorily explained, but he demanded an explanation full and complete in the interests of the Colony; but the parties approached each other as officials communicating with each other should do, with perfect courtesy. He went on—"It was found that all the rolling stock placed on the line prior to the year 1881 was paid for out of the Company's capital account." He should have to refer to this in another connection. These letters were written by Mr. Lovett to Mr. Grant as to what had taken place earlier. Mr. Lovett went on to say:—"That all the rolling stock purchased and made during the years 1881 and 1882 was charged to revenue under the head of 'renewals.' These remarks apply also to buildings and other erections. Although such new stock was not procured to replace any that had actually run into disuse, you contended that a certain per-centage, say, 15 per cent., of depreciation on the original stock should be written off yearly, and an amount equivalent to such depreciation allowed to be paid out of revenue for new stock, buildings, &c. to be charged as renewals, and that allowance should now be made for the prior period in which such expenditure has not been equalled by expenditure on renewals. You further contended that as the Company have virtually no capital account now, as you allege, there are no available funds out of which to pay for works of construction other than the profits caused by traffic receipts exceeding the working expenses of the railway, that therefore the Colony must pay for construction items; that it is to meet the public requirements such works must be undertaken; that the Government may avail themselves of the power of inspection as to the necessity of construction work under Sect. 5 of the "Main Line Railway Amendment Act," 34 Vict. No. 13, and therefore there have been included in the charges against revenue for the first half of the present year labour employed in the construction of carriages and wagons, and stores and materials supplied therefor, the charges being continued in the latter half of the year.

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As the foregoing matters are of considerable importance, I shall be glad to have your confirmation of the same before I prepare my reports on the accounts for the last two quarters." In his reply of 30th August, 1883, Mr. Grant writes to Mr. Lovett—"You correctly state the facts of the case," and he goes on to state that "the Railway Company have at the present time virtually no capital account, nor any means by which they can raise money for the purpose of expending it on the line:" and there was an end of the matter. Of course, as Mr. Grant said "my Company has no capital to pay for improvements," it came to this, that they must be bought out of the revenue of the railway; but this was not accepted by the Government. Of course Mr. Lovett having had these facts confirmed by Mr. Grant, communicated with the Ministry of the day, and the Government felt that what was stated called for action and most serious consideration. His learned friend, Mr. Fooks, had said that the Government had starved the railway; they would not allow them to get new engines, or station accommodation, or buildings—in fact, that the Government had tried to starve the railway out of existence. Government had, it was said, prevented them from making profits by preventing them from making improvements that were necessary, such as new engines, building stations, and so on. That was a most unfair observation to make against the Government. He denied that the Government owed any duty to the Company which it had failed to discharge. It had assisted the Company in every possible way, dry nursed it through its difficulties, stood by it, backed its bills, and done all that could fairly be done for it. Under "The Settlement of Disputes Act" the Government found large sums of money for interest, and had helped it over the stile in every possible way it could. Government did not want to starve the Company. Its object and desire was not to take any undue advantage of the Company; but its desire was also to guard the interests of the people under the contract, and to see that for the money paid they should get a proper railway system, which they had bargained for. If the Company could not do it, it was a duty that they should be informed, so that the people who paid for something should get that something to which they were entitled. If the Company could not carry on the line they should dispose of it; but they would not hear of that. Of course, they would hear men say, you should not prevent better accommodation being given, better bridges being built, or better station accommodation. Government knew there were unthinking people who would say, let us have better stations, though the heavens may fall. Unthinking people never stopped to consider the effect of such a demand, so long as they obtained what they wanted; but the Government owed a duty to the thinking portion of the community. They said we must consider the consequences, and the effect of our action, and they did it calmly and dispassionately. They formed the opinion, after due consideration, that it would be unjust to the community that this Company should be allowed to charge all these things to revenue, and that the effect would be to destroy the whole object of the contract, which had been made and adopted for the benefit of the people of this country. Why should they put such a great advantage in the hands of this Company, to the great disadvantage of the country in the event of the purchase of the line? He would now shortly state the Government case. When the Company or their representatives came to this country to construct the railway, they, of course, wanted legal powers to form it, and they had to have a certain Act of Parliament and a contract. A short and simple bargain was struck between them, that is, the Company on the one part, and the Governor, representing the Queen, on the other, that if this Company made and maintained the railway the Governor would guarantee interest at the rate of 5 per cent. per annum on a sum of £650,000, that was, £32,500 per annum. As the Company were coming to a new country, coming to endeavour to develop traffic that had not existed before, it was felt that it should have such a guarantee, until

it should be able to make up from profits a sum equal to the guarantee of five per cent. That was certain to be paid to them. Then it was assumed that after a time they would be earning profits —very handsome profits. He perfectly believed that at that time the Company thought they could construct the line for £650,000, or thereabouts. However, the Company was started, with a capital of one million sterling, in the ordinary way. Afterwards the Company sought and obtained an English Act of Parliament, entitling them to raise £100,000 additional capital. Their idea was that the construction of the railway would cost only £650,000, or something less; so it was arranged that the guarantee was to be, on the guarantors' part, on the £650,000. If the railway should cost less they would be paid in proportion. That was exactly the position in which the parties then stood under the contract. Now it was to be presumed that the Company had proper estimates, and knew what they were doing. If the Corporation of a town intended to contract with some person to make a road, estimates were obtained, and the contractor fixed his price upon the work. If he made a blunder it would be his own fault, and the Corporation could not be held responsible or blamed; it would be the contractor's fault. Well, this was the bargain made with the Company,—this was what they asked for. The guarantee was to last for four years, as it was supposed the line would then be constructed. During that time the Government were to pay the interest, and for thirty years thereafter. It was obviously to be assumed that in a country like this, in the course of thirty years the profits realised would be much more than five per cent.—they might even be ten per cent. or more. The contract dealt with the conditions to be observed in any one of these states of things. If the line earned six per cent. the Company was to have all the profits up to six per cent. If the profits were seven per cent. or over, then this was to happen,—the Government was to share with the Company all the profits over six per cent.; they were to share and share alike; the Government was to apply its share for the purpose of paying back to itself the money paid under the guarantee of five per cent., and from the expiration of that time onwards the Company was to have all the profits. That was simply the interpretation of the contract. The Government was to give them backbone as it were, to dry nurse them on, until such time as the railway should become a paying concern. The understanding was this, that if within thirty years this thing paid handsomely, then the Company was to pay back the money which was given them as sustenance, as it were, at the time the bargain was struck. The Government of course recognised that they had an interest in the railway during this period, that they were in fact partners in the concern. In technical language, they had a mortgage over the receipts, but no capital invested in the partnership. When men joined in the position of partners, the jury would observe, they usually shared in the profits and the losses, but here the Government shared the profit after six per cent. and practically paid the losses up to five per cent. If there were not profits up to five per cent. it was practically a loss to the Government, because they had to put their hands in their pockets to give the Company profit up to five per cent. The members of the Government came to this conclusion: there was a company, although working a line of railway under a guarantee like this, and in some degree mixed up with the Government, still it was no more than any other mere adventuring company. Government felt and saw that this company was in reality no more in the Colony of Tasmania than any other railway company would be in England—where they were all free of the Government—and could not be differently treated. This company had no right to expect to lean on the Government. Outside the contract it must stand by itself, find its own finances, carry on its own business, and pay its own expenses just as any private individual or company would be expected to do. The mere fact of its having been mixed up with the Government under the contract, they found, gave it no right to lean on the Government; no right to call on the Government to pay money out of their pockets. But then, it was whispered, "Oh! what will the people say if the railway is stopped? We are in want of new rolling stock now—the people all expect from the railway new stations and other accommodation; we have no money; now you pay for them." The country had a right to a share in the profits, and the Government had a right to see the people dealt with in a similar business way as between man and man. Let them bear that in mind. How would the thing work out? Think of this position. It was particularly certain that the Company could get £32,500 from this Government for interest, and it was certain they could not get more. It was equally certain that if on that line they were to build fine stations or admirable bridges that would last 100 years, or if, to increase the train service, they were to obtain expensive and fine rolling stock, for whose benefit would it be? Would it not be for the Company's? The Government had no claim. The Government could not, if in the direst necessity, realise one farthing from the line. Then let them suppose the Company could not pay interest to their debenture-holders or bond-holders: what then? Why the insolvent court would step in, or the winding-up Act would deal with them and sell the railway up, and the Government would not get a fraction. It was a splendid thing that was being built up. The shareholders in England had only to agree to stand out of their money for a few years and they might fairly hope to be repaid with a handsome profit. They had only to remain quiet for the present, get the line well equipped at the expense of the Government, and all would come straight. If the Government purchased the line they could divide a nice little nest-egg, and if they did not purchase, they would find themselves as comfortable a railway company as any in the country. They could say, "We will make the Government pay, and will build up for ourselves a splendid property out of the profits from year to year." It was true the Government had the right to buy the line, but on most disadvantageous terms. The Company's business, both existing and prospective, was to be ascertained. Nothing could be more liberal. It takes the suggestion outside the line of

this argument. The Government might have to deal with the line as a purchase hereafter, is the argument put forward in favour of many of these demands; but the Government, whenever they take it, can only do so under circumstances most favourable to the Company. Two valuators were to be chosen by the Government and two by the Company, and these four appointed a fifth, and the Government had to pay just whatever they gave. That they would not consent to. These five men would value the railway in detail, and what would they have to pay? Why, the utmost farthing they could show it might be worth. Then the Government would be made to pay, and the Manager would go home and divide the spoil amongst the shareholders,—the price obtained from a Railway which in reality cost them nothing, but which had been built up out of the receipts from year to year; and the shareholders would have every reason to be satisfied with the results of their self-denial for the last few years. That was the position. Stick to the Government, and don't care who the Ministry is; and if you can't deal with them under the contract, haunt them at every point until they consent to what you require. That was the policy of Mr. Grant, in his innocent way, with a Queen's Counsel sent out from England at his elbow for fear he should give himself away. He thought they might safely trust Mr. Grant anywhere; Mr. Grant would not throw away much. The Company evidently knew its man when they sent him out to make what they perhaps called the best of a bad bargain; but when the Government suggest that Mr. Grant, or the Company, should give the line up, "Oh dear, no, that is the last thing they should think of doing." The Company is on the verge of the Insolvent Court, you know; they have no capital, and don't know where to raise money to carry on; but when they are asked to give up the railway, not a bit of it,—that is the last thing they would think of. It reminded him of the patient long-suffering man with a large property that does not pay, but when asked to give it up, not a bit of it, not if he knows it. Mr. Grant knew the most that could be made out of this Company, and how to work it. When told that his store was chargeable to capital, he says, "Well, yes, that is very true; I can see plainly." He knows it is no use throwing chaff towards the Government officials, who are as old birds as himself. He is not going to say anything, beyond that he thought it should not have been charged out of revenue; it was a capital charge, and the Company thought the same; but he says, "Let us lay our heads together and see what can be done: you are the Government, I am the General Manager and representative of the Company. I want all the money I can out of the Government to keep the Railway going. We have no capital; can you suggest something?" The Government would consider the matter calmly, and he thought it would admit of only one conclusion. Then other arguments might be brought to bear: "Think, now, what your chance of holding office would be if at any time the public found the railway stopped? Had we not better agree to take all these things out of receipts and not out of capital?" But the Government insisted that it was not fair, and that the amounts should be paid out of capital. Time rolled by, and it became necessary to audit the accounts of 1884 and 1885, and again it was found that Mr. Grant had got more rolling stock and paid for it out of revenue and receipts. No doubt he thought, on the principle that constant dropping will wear away a stone, that it might pass without notice; but again the Auditor objected, and again the Government were quite firm. They saw what the result would be if that interpretation of the contract was to be permitted. The Government saw that they would be sold body and bones in this way, beyond having to pay the stipulated £32,500. They saw that if this were allowed they could never have the advantage of the clause as to profits, and they insisted they were capital charges. Still anxious to assist the Company, they said this, we will suggest another course. Mr. Grant tried diplomacy, and tried to show what trouble would come of it, but Mr. Burgess, who was Treasurer, was firm, but said, "I'll tell you what we will do. There is in Victoria a man, who has the reputation of being thoroughly up in all matters of railway management, a man named Speight, I will send to him your demand to have the maintenance and repairs paid for out of the revenue of this railway instead of out of capital, and I will give you the advantage of any view he may take." Now he, Dr. Madden, thought that was extremely fair. It was exactly the view a British Government should take. This Government was not trying to take any advantage of the Company, they wanted to decide the matter honestly and fairly, and not to keep from the Company anything that was their due. Accordingly, Mr. Speight was communicated with, and his opinion was that every one of the items submitted were capital charges; not one of them would be payable out of maintenance and working. But Mr. Speight saw it was alleged that the Company had no capital, had none and could get none, and under these circumstances he suggested that the Government should earmark these items and carry them to a suspense account, and then if ever they bought the railway these works with the line would belong to the Government, and the items might be deducted from the amount of the purchase money, and the Company paid the balance only. He thought this was a very sensible suggestion on the part of Mr. Speight, but Ministers at the time thought it was one upon which they could not act. They came then to the second line of items in dispute. They were now in 1884. In the interval efforts were made to bring matters to a conclusion, but the Company would not meet the case in the way in which they ought to have done and they were bound to do. They had that comforting reflection that they had the Government to deal with, and the Government was the most awkward litigant on its own behalf that they could get anywhere. If the Government happened to break a man's leg, it was considered by the man to be a little fortune in his pocket. Government were quite different in that respect from an ordinary individual, and, above all things, Government had a long purse. So the Company tried to get a concession from the Government, and he did not mean to be understood to suggest that that was done in a fraudulent way up

to this point. He would not say that the Company laid themselves out to scheme or plot a conspiracy to defraud the Government; but there was a view of the matter that they would do well to look at. Few people read their contracts with a generous spirit. Most people were disposed in interpreting a contract to make the best points they could for themselves, and if there was a point they hung on as long as they possibly could. The Government in 1886 desired to bring this matter finally to a head, and Mr. Douglas, the Agent-General at that time in London, negotiated with the Company as to an arrangement in relation to this matter, and they took none of those elaborate and astounding views that were held by Mr. Fooks. They did not suggest that these were not works of construction. They admitted that £10,000 of the money was absolutely a capital charge; but as to the £4600, they said, "We are not prepared to say. They may also be capital charges, but they are matters which might be settled by arrangement." And Mr. Douglas, on behalf of the Government, proposed an arrangement by which £10,000 should right away be admitted as capital charges, and the Government would be willing to guarantee interest upon a new increase of capital of £50,000 which the Company proposed to raise. The matter was just coming to a head, and Mr. Douglas was about to present the agreement to the Government for confirmation—for it was an arrangement which was to be forwarded to them for ratification, and the ratification of Parliament by their invitation—but just when that was taking place there came that which never would be justifiable in the smallest degree at the hands of this Company, and which altered the whole tone of the relations between the parties. The Government of this Colony was at that time floating a loan.

MR. MILLER: I rise to object to this; it has nothing to do with the issue of the case.

HIS HONOR: I think you are going rather far. I do not quite see how this can be relative to the issue.

MR. MILLER: I should have stopped it before. The arrangement that was come to was only a suggested arrangement in the shape of a compromise, and I am going to object to it.

DR. MADDEN said he referred to this arrangement because it would certainly be a matter for consideration of the jury as to how far a jury could rely upon evidence that came from a body that was, at the time he spoke of, resorting to an attitude which he was going to stigmatise as—

HIS HONOR: I should have to shut out the evidence if it were offered. I don't see anything that would lead up to it.

DR. MADDEN: If that were so, your Honor, you would shut out evidence of the negotiations in London.

HIS HONOR: I do not think it affects the contract.

DR. MADDEN: I was going to show the jury what became of the arrangement. The question might be asked, "What became of that arrangement?" And I was going to show the jury why it never came to anything.

HIS HONOR: Then you would have to show that on account of certain conduct Ministers could not do so and so. The reasons for Ministers not accepting it would not, I think, be evidence.

DR. MADDEN said he would leave the matter there. As a matter of fact the arrangement which arose out of the negotiations never came to anything. And then came this position: the Company stood for some time like the cat in the adage, and let "I dare not wait upon I would." At last it was neck or nothing, and the present action came on for trial, and the pleadings were presented on their claim. His learned friend said he regarded these pleadings with contempt. He did not develop the true case, but that was a thing that they could not help: the only thing they could do was to deal with the record as it stood, and that had to be determined by the jury and by his Honor. He would go to another aspect of the case. The plaintiffs claimed in this action £14,600, and the defendants pleaded that all the items that were submitted were undoubtedly and unquestionably new works and not renewals, so that they held the belief that when they came to trial it would be a trial upon the one question he was submitting to them. Mr. Grant did not do himself that justice in the witness-box that they would have liked him to do on Thursday. At all events he alleged that the documents which, as official returns, he sent to Ministers at their desire indicated plainly and clearly on their very face that they were new works, as contradistinguished from renewals, but said that he never paid any attention to them, and never understood them. It was not within the bounds of reasonable belief that he could have entertained this view with regard to the items, because he must have understood—he could not have avoided understanding—that the real question was, whether he could apply receipts to new buildings. It would be difficult to suggest that this statement was anything more than a slip—the result of rapidly answering questions that were rapidly put to him. There had never been a doubt that some of these works were renewals; the Government never entertained the idea that they were absolutely new. His learned friend, Mr. Miller, had eloquently opposed the payment into court of the amounts acknowledged by the Government as belonging to revenue, putting it in a way that made it appear a "recreant" mode of procedure or their part; but he was quite sure that the jury would comprehend the true reason why they entered into court and asked to be allowed to pay the money. He was quite sure that they would have expected, from the written testimony of 1883 and 1884, that no litigation was pending, and not that oral evidence would be taken as to the question of renewals and new work; and therefore it was not of importance for the Government to try and sneak at some little matter that could be suggested to be a renewal as distinguished from new work. The action was taken purely for two reasons—first of all, they wanted the litigation to determine something and therefore they did not want to go off on a by issue as to some trifling sum of

money; so they took the course of disembarrassing those items in order that they could fight them the more easily. And the Government did not desire to wring from the Company that to which they had a just pretence of a claim. Mr. Grant has said some of the items were renewals, and some new works. He could not apportion the amounts, but would say that £600 represented the renewals, and the remainder new work. Next day they had Mr. Nairn, who said he considered that six of them were renewals of the value of £300; but lest it should be suggested that the Government were trying to wring money from the Company to which they were not entitled, he had paid £600 into court so that there should be no doubt about it. The litigation was not a fight between two tricksters who were trying who could put the most money in their pockets, but they were trying to settle the matter on its true and proper principles, and therefore they paid the money into court, and he had no fear as to the result. That being so, he would ask the jury to follow him for a few minutes, because, although the question he was going to deal with—the interpretation of the contract—was for His Honor the Judge rather than for them, he thought they might follow the observations he was going to make with advantage to themselves. The remarks he was going to make were really intended for His Honor; and he resorted to them because of an observation His Honor made in the course of an objection to certain evidence, and relied upon the 6th clause of the contract. This clause had its true meaning and object. It would be, perhaps, well to consider the scheme of the contract, and he would divide it into three parts for this purpose. First of all, it dealt with the duties and relations of the parties before the line was definitely open for traffic. Clause 1 was as follows:—"That the Company shall construct, maintain, and work a main line of railway between Hobart Town and Launceston or 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." It was perfectly plain that what was contemplated was the construction of a line which thereafter should be open for traffic. It did not mean any other construction; it simply meant the construction of the line as then contemplated, which was to be open for traffic within about four years from the start of the undertaking. They were to construct, maintain, and work that undertaking. The next point was the fifth clause, which treated of the line between the period during which it was being constructed and the period when it was open for traffic—"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 30 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 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 said 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." That therefore recognised the two stages, and Section 15 might be looked upon as belonging to the second stage—"All profits arising during the period of construction from the working of sections or portions of the line which may be open for traffic shall (until the whole line shall be open for traffic) belong exclusively to the Company." Then came the obligation imposed on the Company in Clause 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. The whole undertaking was obviously the line from Hobart Town to Launceston, as referred to in Clause 1, and the undertaking as it subsequently developed. That was the obligation on the Company; a portion of the obligation on the Government was referred to in Clause 5. Then there were those Clauses, 8, 9, and 10, incidentally, and 11, 12, 13, and 14, which were the clauses he referred to as including the distribution of profits. Section 14 showed what the Government were stipulating for. There might come a time of deprivation, in which the Company might fail to realise profits equivalent to interest at the rate of £5 per cent. on the outlay, and this was provided for in Clause 14; the liability of the Governor to pay or make up the rate of interest to £5 per cent. would then again arise, and so on during the stipulated period of thirty years. And then followed these words—"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," so that the idea was the Company was to pay themselves 5 per cent. out of the profits if the profits would do it, but if they would not do it, the Government would pay a subsidy towards the amount; and therefore, taking that view together with Clause 8, it showed that the Government were from that time quasi partners in the earnings of the line, because

unless their interests were preserved they could never occupy any other position than that of being bound to pay to the Company £32,500 a year. Then he came to what appeared to him to be a very carefully devised matter in a clause which looked very unimportant indeed when he first looked at it. He thought a few days ago that Section 18 was the least important stipulation; but it appeared to him that it was drawn up most advisedly. The draftsman knew perfectly well what he was doing, and followed out the provisions of the Act 34 Vict. No. 13, Sections 5, 6, and 7, which were as follows:—"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 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 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. 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." Then Section 4 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." It seemed to him that the framer of that contract had before his eyes these three provisions, which were remarkable for the stringency of their nature, realising the fact that the provisions of the contract could only be enforced in this fashion if there was a breach on either side, and an action should arise to determine that it was a breach of the contract. He therefore inserted Section 18, which provided "That the obligations of the Governor and Company under this contract are to be corelative and dependent—the fulfilment of the obligations of the Governor being dependent upon the fulfilment of the obligations of the Company, and *vice versâ*", meaning that they were to go the whole length, and leave it possible to rescind the contract—not merely to take action. It was thought necessary to provide for such a state of things as, for instance, the trains not being run at all. Section 6 of the contract was a prohibitory clause. It 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 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;' the idea being that if they were not doing their work—if, in fact, the Government did the work for them—they were not to go on drawing interest. His Honor would, he thought, see that all this was cutting them down and enforcing their obligations; and the language was redundant, in that it took the language of Section 4 of the Act he had alluded to. To maintain in an efficient manner was to maintain the railway as it reasonably must be maintained, and therefore, to carry that further, and to provide for all, that was merely a redundancy of language. The line being open for traffic, Section 16 of the contract showed the Company what its obligations were, and Section 5 showed that the Government and Company were dependent the one upon the other. The Government would do the work, but the Company would not get the interest while they did the work. Section 6 threw a great deal of light upon what was intended to be meant by the words "maintain and work," and these were words for the jury to decide thereafter as to their meaning. Then came the other question as to payment out of revenue or capital. His learned friend, Mr. Fooks, had stated that the words must mean payment out of revenue for works of construction as the line

developed. The words were that the Company should be bound to do so and so. What did that mean? It did not mean that the Company should be bound to do it at the cost of the Government, or that the Company should be bound to do it with the right to abstract from a fund in which the Government had an interest. Supposing they took two individuals—John Brown and Thomas Smith. John Brown was to keep a certain undertaking in repair, and Thomas Smith was entitled to an interest in the profits of the undertaking. If the obligation was on John Brown to do it, it was obligatory on him to find the money necessary to do it—to do it out of his own pocket. This was merely to illustrate the matter and simplify it, and he submitted they must go the full length to interpret the obligation. Unless it was expressly set forth in the contract that John Brown, in performing his obligation, could resort to money that did not belong to him, he could not do so; he must do it out of his own fund, at his own cost, and out of his own pocket; he must not apply money that did not belong to him to the purpose. The same thing applied to municipal works. The men who undertook to do these works must do them under the maintenance clause, and would have to find the money. Government might just as well undertake to do the work themselves. He apprehended that the legal and ordinary meaning was, that the Company should do the work at their own cost, and that was beyond contention. The Act itself contemplated that the Company was to pay for the work out of their own pockets, and that was the way he submitted it should be read. Now they came to the question on which it was his intention to try if the Company had to pay for these works out of their own pockets. The only position they (the Company) took up, either at the hands of Mr. Grant or the Directors in London, was this: they said, "We have not got the money; we only raised a million loan formerly, and have since got an Act of Parliament to borrow money." But what had that to do with the Government? No more than it had to do with him. They were called upon to perform a certain contract, and they should do it or take the result. The Company stood in no different position to any private individual. Let them try to consider the soundness and firmness of his learned friend's contention, because it was not true; it was only casuistical argument to evade an obligation. This was the position:—It appeared by their balance sheet that they had got capital. Mr. Grant was going to tell them that it did not mean money, but the jury would see what it was. It purported to be a statement of capital authorised and capital received; a statement on the other hand of capital expended, and a balance of £45,000 in hand. As men dealing with accounts, they must see instantly that this claimed to represent a cash balance; and if it did not, that balance sheet was, he was going to say, a fraud upon the shareholders in the Company and upon the public, but he did not like to utter such rash words; but at any rate it stated upon its face a thing it did not intend to convey. He would call evidence to tell them that the statement was clear evidence that there was a cash balance to that amount. That being so, they had £45,000; if they had not got it they must have made away with it, because it was undoubtedly a thing that would be easily explained on the balance sheet as published, unless they moved contrary to law, and in a fashion that was illegal. They were not allowed to pay dividends out of capital, and they could be made to replace every penny of it. But suppose every shilling was gone, what was there next? The Company was registered in the Colony, and he supposed that was done for the purpose of enabling it to be wound up either in England or Tasmania. The Company had authority to increase their capital, and there was nothing to prevent them from doing so in the ordinary way, or supposing they did not like to do that, in England they could apply to Parliament for authority to issue debentures and borrow money. So that when they took this view, and said, "We have no capital," there was no reason in the cry; but they would rather pay it all out of revenue, at the expense of the Government milch cow. They said they had not got the means; but, as a matter of fact, they had the means. But they went a little further than that, and said, "We have not got the credit." That brought them to the same position everybody got into when they exceeded their capital, though he did not think that was the case with the Company. They said, "We are unable to carry on the business any longer," and their simple duty was to go through the ordinary course of companies and be wound up. When men could not perform their obligations that must be done. His learned friend, Mr. Fooks, now told them that the true position was this: "Mr. Grant is one of those easy-going men who do not know what they are talking about." He told them that the undertaking was not the line as proposed to be constructed between Hobart Town and Launceston, but that they could go on constructing lines *ad infinitum*. Suppose they got authority to construct a line round the north-west coast—this was to be part of the undertaking. Suppose the Tasmanian Steam Navigation Company had not sufficient service, they might do as English Companies do, set up a line of service for themselves. Well, if the Company were to undertake that work it was to be part of the undertaking, and to be paid for out of the revenue. The undertaking was one *in futuro*.

MR. FOOKS: I never said or implied that such works were to be paid for out of the revenue from the line, but that the undertaking was as represented in the contract, and the position I took up with regard to the contract I intend to maintain.

DR. MADDEN: So far they were both agreed that the undertaking was to be carried out as stipulated in the contract, and, proceeding on this view, he thought that he had shown that the obligation was distinctly and emphatically on this Company that they must perform it as other companies ordinarily perform such obligations. That being so, the only remaining thing was to ascertain what were matters to be paid for out of revenue and what were matters that should be borne out of the revenue which the line earned, and this really brought them to the question which

they had to try,—the grain of wheat which they had been seeking to thresh out of the bag of chaff. They must get it out; and when they had it it would not take the jury ten minutes to come to a decision upon the point. The obligation of the Company was to maintain and work the line, and the Government had tried to make Mr. Grant understand that he was to pay out of revenue that expenditure which was necessarily applied to the working of the line, such as the payment of stationmasters, gangers, &c., and ordinary working expenses, and also gave up to him everything that was a renewal; in fact the Government had, up to the last moment, carried that out, and paid into Court money which the Company stated was due for renewals. The Government had contended that the Company were not entitled to pay out of revenue that which is ordinarily paid out of what railway men call "construction," and they stated that all these items were construction. On that point there was very little indeed to say. He was going to call witnesses before them—some of the best authorities that could be got on the subject—men of world-wide fame, Fortunately there had been thrown on the shores of Tasmania a gentleman who was eminently capable of giving an opinion on the subject—Mr. M'Hardy, Auditor of the Highland Railway Company. All these witnesses would tell them that every one of the items were chargeable and should be charged to construction in any railway company in the United Kingdom. In that respect they would not differ very materially with the witnesses for the plaintiffs, because Mr. Patterson, who knew perfectly well what he was speaking about, and knew also that he was to be called upon, and need not have been disquieted so much as he had been, told them that all the items in which they were now concerned were items of construction, so that he concurred with the Government in his opinion. Then they had the evidence of Mr. Lavater, and if there was a man who could start a new theory it was Mr. Lavater, but his evidence clearly showed that according to all practice the items were items of construction. But he also told them that there was a lingering desire in his mind to revolutionise the world and turn things topsy-turvey. Then Mr. Mais was called, and he was quite clear that rolling-stock was an item of construction, but he lingered over it for a time; he felt that desire to try to hide something for his side, and he introduced this curious opinion: if you get rolling-stock, and it is an increase, it would go to construction; but still if you get it in anticipation, it would be paid for out of revenue. If that were so, and they bought Bob, in anticipation of his taking the place of Dobbin, they would pay for him out of revenue. Every one knew that the new must take the place of the old. The argument was, there is an old engine; off it goes; there is a new one in its place bearing its old number. But where the engine was new, with a new number, then they were not anticipating the time when the old one would be worn out; they would be taking an additional engine as absolutely new matter chargeable to capital. Therefore his (Mr. Mais) evidence would not be bound to conflict with the evidence he would place before them. He would therefore say no more upon that point, but the witnesses would one and all maintain that all the items were items of construction, and could not, in any railway man's opinion, be chargeable to maintenance. The first item they were concerned in was the erection of a store in Hobart yard, because that portion of it which related to the fitting up internally of the store was covered by the £40 paid into Court that morning. There was a doubt about part of it, so the Government paid the whole amount, and therefore the question was, whether the erection of a store in Hobart yard was a maintenance or construction charge. It was a new building. They had an old building, but determined that the stores were getting too large, and that they were not in the best place. The result was, they decided to pull the partition asunder and build an entirely new place. They did so, and into that new building the stores were put. He did know how that could be called a maintenance charge; it certainly was not a repair; it certainly was not an alteration of a thing which already existed. It was a thing that did not exist before, built on a new site, appropriated to that new purpose. It was suggested that, suppose for the purpose of carrying on the working of the railway, it was necessary to do certain work; they had a carpenters' shop, but they wanted more men, more shelter; it might be urged that one might start a hundred yards off altogether, and set apart the old building for some other purpose. Let them leave this for half a minute. Supposing one got married and had a house with five or six rooms. Well, in course of time the nursery became full, and by the time No. 10 or No. 11 came into the quiver, one began to think it time to get larger premises, and, perhaps, ran up another building at the back of the old house to provide for the future; but would any one say this was maintaining the old nursery? That seemed to be a new matter. If it were more convenient to make a nursery of it than a billiard-room, it was a still a new work, and he therefore submitted that this new iron store in the Hobart yard was a capital or construction item. Some of the witnesses were a little embarrassed, thinking the brass furnace was included and was a renewal; but when they were told that this had nothing to do with it they began to beat about. Inasmuch as it was an adoption of a new engine for an old one, they said, "Well, it was a new engine, but instead of an old one, and had to be provided for, otherwise it would be damaged by the weather." It was a new place right away from the old foundation. A new building was put up there and capable of providing for the new engine; also a new stack. They then pulled down the old materials and disposed of the old engine. Say one were a brewer and carrying on business with a certain number of vats, and came to know there was a new and better kind; he says, "I will lay out more money and build new vats." Suppose he did this, and consigned the old vats to the fire or waste heap, could it be said this was maintaining the old vats? Supposing any one of the jury were a director of the concern, how would he enter it? Surely it would go into the capital account. The new work was to last for all time, or, at any rate, for a long time, and during that time it was

intended that it should pay a profit. If so, it must be regarded as an outlay upon which one must enter whether he got interest or not. It was not like the bales of hops or bags of sugar that were required to succeed the old brew by the new, but it was a thing which was to last for thousands of brews, and, therefore, the jury would have no difficulty in saying that the new shed was a new work. As to the rest of these items they were happily treated, as it was admitted that, as to the balance of works, they were works of construction, except those paid for into Court. With regard to the remaining huts, Mr. Lavater admitted that on all Victorian railways these were charged to construction, and Mr. Kent, who had been doing most of the Railway work, while Mr. Lavater, like an Adonis, had been engaged in beautifying the Court at the Melbourne Exhibition, had also told them that these items were charged to construction. So they might relieve their minds of that matter. As to the rolling stock, there was no mystery except that lingering wish of Mr. Mais's to argue the matter from a theoretical standpoint, only that His Honor pointed out that it was admitted that no additional stock, except in place of that formerly existing, could be charged to renewals. Everyone admitted that. So there would be no difficulty in saying that each and every item of this rolling stock would be chargeable to construction, notwithstanding the attempt to mix the pea and thimbles. Mr. Grant and Mr. Cundy both told them they were additionals. Mr. Grant, with one deep and deadly sigh—

Mr. Miller: He did not sigh.

Dr. Madden: Well, he did not sigh, but he admitted that all these were additional. This was really the matter they had to try, and it was perhaps a matter of regret that the jury should have been so long engaged in getting at such a simple point; but it had become involved in a great deal of correspondence and documentary evidence. Finally, it came down to this—whether the items in dispute were works of construction or works of maintenance? If they decided they were works of construction, they would settle the matter very simply and properly. He regretted having had to occupy so much time in his address, but promised if it became necessary to again address the jury, it would be so short that it would make some amends. He could not but thank them for the close scrutiny and attention they had given to the case.

His Honor: You have not yet referred to item 17.

Dr. Madden: Thank Your Honor. He had kept this very item carefully before his eyes during his address, and, of course, for that very reason had forgotten it. The item was one with which they were concerned, and that was the charge for trustees' remuneration the Company had agreed to pay out of the revenues of this railway; and in regard to this matter, his friend Mr. Grant did not appear to have been taken into full confidence by the directors. They gained the additional information that directors' fees were charged to maintenance, but these were not directors' fees. When the dispute arose prior to this, and the Company were unable to pay interest, they went on the London market and issued debentures, and subsequently loaned £100,000 by mortgage, the debenture-holders agreeing to take 4 per cent. instead of 5 per cent., and wait for their money. When this happened these debentures were issued, and some gentlemen were appointed to see that the debentures were properly dealt with. They went on and did their work for nothing for some time, but when the receipts of the Company rose from £16,000 to £69,000 the London directors thought they had the right to vote six years' remuneration. They had never had any, and did not expect any, but £472 10*s.* was voted to these gentlemen. The directors then charged this against the working expenses of this Company. Whether it were true that directors' fees were chargeable to working expenses he could not say; but, certainly, remuneration to these people who had nothing whatever to do with the working of the railway should not so be charged. They might just as well charge the Government with the commission paid to their brokers for selling their debentures. It had been pointed out to him, moreover, that there was a very curious family likeness between this item and the difference between the 4 per cent. and 5 per cent. These debenture-holders were to get 5 per cent. at first, but afterwards 4 per cent., and this sum in question was exactly 1 per cent. What had practically been done was, that the Company had paid the trustees the difference between the 4 per cent. and 5 per cent. He could not see how this could be regarded as a working expense.

His Honor said it was unusual to sit on Saturday afternoon unless there were special reasons, and on the counsel on both sides expressing themselves in favour of an adjournment, the Court adjourned until 10·30 on Monday.

Monday, 13th May, 1889.

The Court sat at 10·30 A.M.

Mr. Fooks said: Your Honor, I regret very much I shall have to call your attention to what I consider to be a repetition and aggravation of what before appeared to me to be a contemptible matter. My offices were evidently not appreciated, and, though I do not personally care, it has now become a matter affecting the dignity of this Court. The paragraph, which appears in the *Mercury*, is as follows:—

With the fear of a "dungeon cell" before our eyes we must yet call attention to the fact that the indignation of Mr. Fooks, Q.C., is rather out of place. In our first paragraph we said that "if we remember rightly," he was the person who doubted the fairness of the Local Court of Justice (they said a good deal more than "doubted"), and when he said that he was not we at once accepted the denial, and

made what he calls the *amende honorable*. That should have been enough for him. As to our remarks being impertinent, he will perhaps, without wishing to convey us to "the deepest dungeon beneath the moat," in the style of the transpontine drama once so popular in London, permit us to say that we regard still our remark as quite pertinent in connection with the case between the Main Line Company and the Government of this Colony. For the imputation was made, and commented on by us, though possibly not by Mr. Fooks, Q.C.; and is but one of many statements of a similar kind to which we have had to refer from time to time. In fact, it has been stated in London that the Colony is a den of thieves, because it declines to give the Main Line Company all it demands. Some time will be required to search through our files, but when we have found the statement referred to we shall place the saddle on the right horse.

I say this is a serious contempt of Court. It plainly shows it refers to the issue now before the Court, and whether they attribute the statement contained therein to me or not, I care nothing,—it is simply impertinent; but it is seriously calculated to bias and to prejudice the minds of the jury, and of the community with which the jury are concerned, and to bring the administration of justice into contempt, and to embarrass it. Having made these observations, I leave the matter in your Honor's hands to assert the dignity of the Court.

His Honor: I have no doubt whatever that *primâ facie* that is calculated to affect the minds of the jury, and to influence the community against the Main Line Company while the case is going on. I have no doubt it is contempt of Court, for which the editor of that journal is liable, and if there is any application made to me I will order his attendance before this Court to answer what appears to me to be a gross contempt of Court, because it is repeated, and apparently with the object of coming again before this Court.

Mr. Fooks: I am quite content with the expression of the opinion of the Court. The Company for whom I am acting is not a revengeful one, and whoever the magnificent "we" may be, he is safe as far as I am concerned.

His Honor: I can quite believe that there was no intention to influence the jury, but is rather an attack on the counsel. I think, as a rule, the Press here are very fair in reserving their comments on cases under hearing, and this is one of the exceptions to that rule, which I am very sorry to see.

Mr. Fooks: As far as the Company is concerned, we are quite satisfied with the Court's expression, as our end is answered.

MR. FREDERICK BACK *called in and examined.*

1. *Dr. Madden.*—What is your name? Frederick Back.
2. You are General Manager of Government Railways of Tasmania? I am.
3. And you are an Associate of the Institute of Civil Engineers in England? Yes.
4. Before you came to this colony what were you? At that time I had previously held the position of General Manager of the Railway at Christchurch, New Zealand. I had been Traffic Manager and Assistant Manager, also Chief Accountant of a system of railways extending over 1500 miles.
5. Are you familiar with the expressions "maintenance" and "working expenses" as used by Railway Companies? I am thoroughly familiar with them in their technical meaning.
6. As a matter of fact are these words of common use among railway men in railway matters? I think I might make my answer clearer by making a short statement.
7. Are these words distinctly understood among railway men? Undoubtedly. Owing to revision of accounts they must be known to all dealing with railway accounts.
8. Well, to begin with—can you give any exhaustive definition of what they do mean?—can you, apart from these items give the meaning of the terms?

Mr. Miller.—The definition must be either universal or so general that it must come under general usage.

Mr. Fooks.—It is understood that the terms are not used in a technical meaning, but were to be taken in their ordinary sense, either for engineers or anybody else.

His Honor.—What we really want to know is what specific works would come within these terms.

9. *Dr. Madden.*—Taking that view of the case, I must ask you, Mr. Back, if you are familiar with the items now under discussion? Yes.
10. Erection and fitting up internally of store in Hobart yard; building the covering and chimney-stack for exchange locomotive shop, engine, and Cornish boiler, and preparing site for removal of brass furnace; putting up porch in front of station to keep vehicles from front door: under what heading would these items go? In my experience they would be charged to capital account.
11. Are they connected with working expenses in any way? No, I should think not.
12. They would not appear in maintenance or working expenses? No. I should say decidedly not.
13. Now, we come to a series of gatekeepers' lodges, of which some were erected in renewal of those previously existing and others which are wholly new erections: would these come within the definition of maintenance or working expenses? They would not be charged to maintenance or working expenses. Might I be allowed to say maintenance has this meaning—it means simply the maintenance of the line and its buildings. There is an Act of Parliament which lays down how railway accounts are to be kept.
14. Carriages and additions to rolling stock—do these go to maintenance or working expenses? Decidedly, they go not to working expenses, but to construction.
15. Will that apply to all rolling stock which we have at issue here, and gatekeepers' lodges? Yes.
16. *Cross-examined by Mr. Fooks.*—I think you said you occupied the position of accountant? Years ago I held the position of Chief Accountant to a system embracing 1500 miles of railway. That was in New Zealand.

17. How many years have you been manager of railways? I have been actually manager for 10 years, but before that I was Traffic Manager, and before that Assistant Manager, and so on, step by step from—

18. You spoke of your position as an accountant? Yes. I will endeavour to make myself clear to you. I was at one time Chief Accountant, but left that to take a higher position.

19. Was that in England or in New Zealand? In New Zealand.

20. Then your experience is confined to New Zealand? Yes; with the exception that, having been in England, I made myself conversant, while there, with the system used in keeping railway accounts there.

21. When did you become an Associate of the Institute of Civil Engineers? Quite recently.

22. The title does not necessarily include membership of the Institute? No. I take it as a great compliment, and believe only one other gentleman in Australasia has been so complimented.

23. In point of fact, you are not a civil engineer at all? No.

24. Have you ever had experience as a mechanical engineer? No, but, as the head of the works, the whole of the work is under my control; but we have specialists engaged, and these officers are controlled by me.

25. These railways in New Zealand—are they maintained out of the revenue of the Government, or how? Yes, they are entirely governed as the Victorian railways.

26. And, in fact, the revenue must come out of the colony? So far as the revenues of the railway form part of the Consolidated Revenue, you are right. All the lines I have been connected with were Government railways, exactly the same as the line I am on now.

27. They are really paid for out of the revenue of the Colony? In so far as the earnings go to the revenue of the country, so far the railway expenses are paid for out of the revenue of the country. The lines I was on were fortunate enough to be earning enough to pay our way and leave something to the good.

28. I understand you have never been Engineer-in-Chief, nor have had anything to do with the engineering department? That is quite right.

29. I suppose, as holding the position of Accountant and as Manager, you have had some one over you in the Government, and take his instructions? I certainly do not take instructions as to the method of accounting. In fact, I instructed the Government. When I accepted the position I was given four bare walls and an empty set of books, so I was really the individual who instructed the Government as to how to keep the accounts.

30. Do you, as Manager of the Railway, take instructions, or are you left entirely independent? The affairs of this Colony are managed by Ministers who—

31. Do answer my question. I ask you with reference to the management of the railway. You have got duties as Manager. Now then, do you act independently of the Government? I follow such instructions as the Government think fit to give to me.

32. And if a question arose as to which account an item should be entered, you would take the directions of the Government as to where it should be put? Well, the Government have never given any instructions; such a case has not yet arisen.

33. Well, if there were a difference of opinion, you would take their instructions? I cannot say what I should do. You are asking me to answer a question as to a matter which has never occurred. If any Government asked me to keep accounts in a manner which I thought was wrong I should not do it.

34. If you got instructions to enter such an item to maintenance or working expenses you would not do it? I cannot say what I would do. The Government has never interfered in this manner.

35. You cannot say? No, I cannot give an answer to a hypothetical case of that kind.

36. Now I understand there is an Engineer-in-Chief over the whole of these railways? I have nothing whatever to do with him, nor has he anything to do with the railways after they are constructed. They are then entirely under my control.

37. You say that the Government Engineer-in-Chief has nothing to do with the railways after they are constructed? That is my answer.

38. That he has no duties to perform in reference to the railway after it is constructed? You had better get that from him. I do not know what his duties are, but he has nothing to do with the railway.

39. Then he is merely an ornamental officer? I said nothing of the kind.

40. Has he no active duties to perform with reference to the management of the railways? No.

41. With reference to the maintenance of the works? No.

42. Nothing to do with rolling stock or repairs? No.

43. Nothing in the shape of advising or anything else? No; the whole of the work is under my control, and not of the Engineer-in-Chief.

44. Is there a Resident Engineer? Yes; there is an officer of my staff a Resident Engineer.

45. Then it would be the Resident Engineer's department to see to the working? Yes, it would be his department, acting under my instructions.

46. He would see to the maintenance of the permanent way? No, we have a special officer for that—the Locomotive Superintendent.

47. Rails, sleepers, ballasting, &c.—he has to do with that? Yes; he is the one of my staff who does that.

48. Is he here? No.

49. And not coming here? I don't know.

50. Do you know whether he is in Hobart? I do not know.

51. Have you seen him since this case began? Yes; I saw him on the Derwent Valley Line on Friday last.

52. *Re-examined by Dr. Madden.*—None of these opinions which you have given us as to the proper position of the accounts have been dictated to you under any circumstances? No, certainly not.

53. As to the Engineer-in-Chief, his position, I believe, is this—or will you tell us what his relations are with you? I have no relations with him. He constructs the railways, and then they are handed over to me.

MR. JOSEPH HENRY SMITH, *examined by the Attorney-General.*

1. You are Chairman of Railways in South Australia? Yes, since May last year.

2. Previous to your arrival in South Australia, had you experience in England? Yes, on the Great Western Railway.

3. What position did you hold? I was Chief Assistant to Mr. Gurson, the General Manager of the Great Western Railway.

4. Can you say whether the words maintenance and working expenses have a well understood meaning with railway accountants and management? Thoroughly so.

5. You are familiar with the items in dispute in this case? Yes.

6. Take the first item—Erection and fitting up of store in Hobart yard? Would you say that was included in working expenses or not? Certainly not.

7. Have you seen the store in question? I have.

8. And you have heard how the store originally stood? Yes.

9. Now, take the second item—Building the covering and chimney stack for exchange locomotive shop engine and cornish boiler, and preparing site for removal of brass furnace—would that come under the heading of maintenance or working expenses? Certainly not.

10. The next item—Putting up porch in front of station to keep vehicles from front door—would that come under the heading of maintenance or working expenses? Certainly not.

11. Gatekeepers' lodges: erection of 15 lodges, for which a rental of 3*s.* and 4*s.* per week each, according to size—would that come under the heading of maintenance or working expenses? Certainly not.

12. Carriages and waggons: 5 second-class carriages, 2 second-class excursion carriages, 4 horse-boxes, and 12 low-sided trucks—would this come under the heading of maintenance or working expenses? Certainly not.

13. Does the rolling stock ever go under this heading? No.

14. Is there any account to which it should be charged? Certainly—capital account—an account known all over the world.

15. Is that account the same as construction? Yes.

16. *Cross-examined by Mr. Miller.*—Progressive and continuous construction? Certainly not.

17. Original construction? Yes.

18. But supposing they did not exist at the time of the opening of the line for traffic—then would they not be works of progressive construction? I do not understand the term progressive construction.

19. Well, if your understanding is limited, I will try to approach your understanding in another way. If these were works not originally necessary for traffic at the time of opening, but became subsequently necessary, what would you call them? I must really say I do not follow you at all.

Mr. Miller.—Well, I thought your intellect was more brilliant.

His Honor.—That is too strong, Mr. Miller.

Mr. Miller.—I at once accept your Honor's suggestion, and apologise for the remark.

To Witness.—If these works were not part of original construction, and were not necessary to the completion of the line, but subsequently became necessary for the expansion and increase of the traffic—works necessary for the development of the railway—what would you call them? It is a very peculiar question to ask. If you put it in this way—were they maintenance or capital requirements?—I unhesitatingly say they were capital, or, as I understand the term which has hitherto been used, "construction."

20. I must put it in my own way. Were they works of construction? Certainly.

21. Then they do not follow your definition that maintenance was work necessary for the completion of the line?

22. If a person was under a contract to simply construct a railway, he would, on its completion, have fulfilled his bargain? Yes, for the time being.

23. These works subsequently became necessary in order to keep pace with the growing requirements of the traffic—that you understand? Yes.

24. Now, I ask you to tell me under what heading you would put the fulfilment of these requirements; I ask you to say in a word or two what heading you would put these under? Simply capital account, or what I take to be synonymous construction account.

25. Would they be necessary construction? Unquestionably.

26. Without them the undertaking could not be properly carried on? I should say, certainly.

27. Then it would simply remain a question as upon whom the cost of that expenditure should fall—is it not so? Under what circumstances?

28. Generally. The only question remaining, as this was necessary construction, is who ought to pay for it? I do not see that it follows at all. The Company making the railway must find the capital.

29. I am asking you this—the only question would be who is to pay for it? Yes, in the case you put.

30. That would depend on the terms of the contract? Yes.

31. You have spoken of your experience, and have stated that these items under general usage would form part of capital expenditure? Undoubtedly.

32. This—that additional rolling stock rendered necessary by the expansion of the traffic—would be a charge upon capital? Unquestionably.

33. And this is the universal experience of railway men? Of all railway men who know anything about their business.

34. Are you not aware that it has been a standing complaint charged against railway companies that they improperly charge rolling stock to capital expenditure? Since the year 1868, when the Imperial Act was passed, I have never known of such a case.

35. You have stated that the additional rolling stock would be necessarily charges upon capital? Yes.

36. I ask you, to test the value of your experience, whether it has not been a great and well-known

accusation against companies that they have charged it to capital? As I said before, I have never heard of such a case since 1868.

37. Do you know the Index to our Railway System and Leading Lines, by Wm. Fleming, 1878 to 1879—is that a work of authority? No, it is a work of no authority.

38. You say that this work is of no authority whatever among the railway companies of Great Britain, and if it makes a complaint that an abuse exists among railway companies in charging additional railway stock to capital, it is a baseless statement? No, I do not say so. I know, to the contrary, that many shareholders at the public half-yearly meetings of the principal railway companies have, on the other hand, complained of the large charges to the revenue for rolling stock; and in the reports of the London and North-Western Railway it will be seen that no less than 48 engines were charged last year, and many shareholders thought the directors were going too far the other way.

39. Then the boot is on the other leg? Yes.

40. Is it not a complaint in New South Wales and Victoria that the line and rolling stock have not been maintained, and that incorrect charges have been made to capital? I have had enough to do to look after South Australia, and have not been able to devote much attention to the other colonies as yet.

41. Then you are not aware the accusation has been made in these colonies? I am aware.

42. In all your experience such rolling stock is invariably placed to capital account? No. I give you a case in point. The London and North-Western Railway charged 40 engines to revenue account; but they are a private company, and untrammelled by any contract.

43. Now we find that the premier line in England is an exception. I now turn to the report of the Great Western Railway, from the Locomotive and Carriage Department, under date 18th January, 1873. Where were you then—on that very railway? Yes.

44. In that very railway the Report for the previous half-year states—"The stock has been, as usual, fully maintained, and 27 new narrow-gauge engines have been built, and charged to revenue." Is that another exception? No, it is not an exception.

45. It is a comparison between the half-year 1873 and the corresponding half-year 1872. It is in your time? Yes; 16 years ago, but well within my knowledge.

46. Well, I will read on again—"It will be seen by the locomotive account that there is a great increase in the expenses as compared with the corresponding half-year, 1872. This is due principally to the increased cost of coal, and the higher rate of wages now obtaining. The expenses of the Llanelly Railway for seven months are for the first time included. The stock has been as usual fully maintained, and 27 new narrow-gauge engines have been built and charged to revenue." Is that correct? Yes.

47. Well, if that company is also an exception, why did you bring our attention to it when first giving your evidence? This sum was placed to revenue at the discretion of the Directors, and with the approval of the Shareholders.

48. Then the London and North-Western and Great Western Railways are exceptions to the practice you have named? Not at all. I dare say you will see in the report that the shareholders are asked to vote this sum for construction account.

49. Were you not in the employ of the Great Western Railway in August, 1872? Yes.

50. Well, Mr. Armstrong was then Locomotive Superintendent? Yes.

51. He said in his report for the half-year ending January 31, 1873—"During the half-year 28 narrow-gauge engines have been built, and charged to revenue. In the carriage and waggon department the sum of £12,881 has been charged against revenue account for new rolling stock." Was that another exception? Yes.

52. Well, with that I will leave you. Your explanation is that that has to be done with the special sanction of the shareholders? Yes.

53. Well, be it so. Did you travel across this Main Line in coming here? Yes.

54. Have you travelled on it before? No.

55. Were you struck with the palatial splendour of its accommodation? It certainly did not strike me in that way.

56. It did strike you the other way? No; I would not say that.

57. Did you see any expenditure beyond that necessary to the line? No.

58. I ask you were the stations of the most unpretentious character? They did not strike me as in any way unsuitable to the requirements of the traffic.

59. Were they unpretentious? Yes, I think so.

To His Honor.—I was travelling for about three hours in the dark, so could not see very much on the journey.

60. Is it not necessary to anticipate an increase in the requirements of new rolling stock?—in the essence of prudent management is it necessary to anticipate that there will be a certain demand for new rolling stock? Yes; it is reasonable and proper management.

61. And if there is a decrease in the rolling stock, is it not evidence of the necessity for such additional stock?—I am speaking of a natural decrease while some of the stock are in hospital or sold. If there is this natural decrease is it not evidence that anticipation is required? Certainly not. The accounts are not being kept in such a state of things, nor is the stock being properly maintained in accordance with a certified balance sheet.

62. *By the Attorney-General.*—I will put these documents in your hands—(Reports of London and North-Western Railway and Great Western Railway.) In Clause 15 of the report of the directors of the Great Western Railway for the half-year ending 31st July, 1872, a vote of the proprietors is requested for the following expenditure. That means that the expenditure goes to the capital account, does it not? Yes; otherwise a vote of the proprietors would not be requested.

63. What is the expenditure? Goods engines (narrow gauge), £52,500; carriages and waggons, (narrow gauge), £104,350; machinery for workshops, pumping engine, &c., £5620; new engine sheds at Bordesley, Bristol, and Gloucester, and extension of engine sheds at Slough, £14,120.

The Attorney-General.—There are various other items, but the learned counsel's questions only apply to the rolling stock.

Mr. Miller.—I don't understand the answer. I understand the report was given to him to show that a special expenditure was authorised for the rolling stock; he has not read that.

Dr. Madden.—He has pointed out that if it was a revenue item the directors would deal with it, and would not want the shareholders.

64. *His Honor.*—Have you there any reference to a special vote for narrow-gauge engines? They ask for the authority of the shareholders to spend capital money.

65. *The Attorney-General.*—Does that apply to both reports? Yes.

66. *His Honor.*—Does that refer to expenditure on capital or revenue? Capital money.

67. *His Honor.*—It is not carried to revenue? Certainly not.

His Honor.—But it was read out that there were 27 narrow-gauge engines carried to revenue.

Mr. Miller.—Yes, certainly so.

68. *His Honor.*—Is there any special vote for those? There is not.

69. *His Honor.*—Then they were charged without a special vote to revenue? Yes.

70. *His Honor.*—They were replacements, and were therefore debited to the revenue charges for the half-year? Yes.

71. *By the Attorney-General.*—They were not additional rolling-stock? No.

72. *By His Honor.*—The additional rolling-stock is debited to capital? Yes.

73. *The Attorney-General.*—Will you read the part underlined which my learned friend read to you? Yes. "During the half-year ending 31st July the sum of £24,257 has been charged against the revenue account in our carriage and waggon expenses, on account of new narrow-gauge stock. In the locomotive department 24 new engines have been built and charged to working expenses."

74. They are replacements? Yes; replacements for stock that was worn out.

75. Look at paragraph 6, in the Report of 1884—will you read that? "The outlay on capital account during the last half-year amounts to £329,800, of which sum £137,144 has been incurred in the supply of additional rolling-stock."

76. Carried to capital account? Yes.

77. A vote of the proprietors means the same thing? Yes.

78. The additions to carriages, &c.—how would they be charged? To capital account.

79. Should provision be made for the stock to be placed in hospital in the proper equipment of the line? You cannot properly equip a line without taking into consideration the repairs to the original equipment of the line.

MR. JOHN LUNT *called in and examined.*

1. *By Dr. Madden.*—You are Chief Engineer of Railways in Victoria? Yes.

2. As such, are you familiar with the meaning of maintenance and working expenses as understood amongst railway men? Yes.

3. Your attention has been called already to the items which are under discussion? Yes.

4. I will read them to you *seriatim.* "Hobart—Erection and fitting up internally of store in Hobart yard, and alteration of original store to form a continuation of carpenter's shop, £346 8*s.* 2*d.*" Have you seen that store? Yes.

5. And having seen it, and heard its history in evidence, would you put it to the maintenance and working expenses of the line as understood by railway men? It would be charged to capital account.

6. And not to maintenance? No, certainly not.

7. Now take the next item. "Hobart—Building the covering and chimney-stack for locomotive shop, engine, and Cornish boiler, and preparing site for removal of brass furnace, £721 13*s.* 5*d.*" Would that item be chargeable to maintenance and working expenses? No.

8. "Putting up a porch in front of station to keep vehicles from front door." Would that be maintenance? No.

9. We have heard of some lodges which were erected as new works, not as works to replace old ones. Would these new ones be chargeable to maintenance? No.

10. Would additions to the original equipment of rolling stock in use be a charge to maintenance? I have had nothing whatever to do with the rolling stock of the lines in Victoria. I could not give an opinion upon that.

11. It has been suggested here that the new stock due to increased traffic consequent upon the expansion of the railway—new buildings erected to provide for increasing traffic—should be charged to revenue: is that so? No, they are chargeable to capital.

12. Is the question whether the matter is chargeable to capital or maintenance affected by the question of their necessity or not?—It has been suggested that if the additions were necessary for the expansion of the traffic, they should be charged to revenue. Is there any such distinction? No. It is all chargeable to capital.

13. *Cross-examined by Mr. Ritchie.*—It is your duty to see to the improvement of your line? Yes.

14. And as you improved your line do you not pay for the improvements out of revenue? No, not if they are new works.

15. Do you not pay any portion of improvements out of revenue? Not if they are new works.

16. Do you pay any portion? Yes.

17. New rails, new sleepers, repairs to buildings, repairs to stations? Yes.

18. And repairs to engines? I know nothing about engines.

19. You have seen the porch in dispute?—would you charge that to revenue? No, to capital.

20. Why? It is a new work.

21. But all repairs must be new works? It does not follow.

22. What is the difference? I cannot exactly say; but if part of a ceiling was falling you would call that a repair; it is not new work.

23. Supposing anything was injured by overwork—such as the rails being torn up—would you charge that to revenue? Yes, I would.

24. Do I understand you to say that it is a hard-and-fast line, universally adopted, according to your experience, that every new work upon every line of railway is not a proper charge to revenue? So far as Victoria is concerned. My knowledge is confined to Victoria.

MR. ROBERT GEORGE KENT, *Acting Accountant Victorian Railways, called in and examined.*

1. *By the Attorney-General.*—Your name is Robert George Kent? Yes.

2. What position do you hold, and how long have you held that position? I am Acting Accountant of Victorian Railways, and have been 27½ years in the Accountant's Branch.

3. Have the words maintenance and working a well-understood meaning? Yes.

4. You know the items in dispute in this case? I do.

5. Have you seen the new store? No.

6. "Erection of store in Hobart yard"—would that come under maintenance and working expenses? Certainly not.

7. The next item—"Building the covering and chimney-stack for exchange locomotive shop, engine, and Cornish boiler, and preparing site for brass furnace"—would you charge that to maintenance? No, to construction.

8. Could you charge the third item—"Putting up porch in front of station to keep vehicles from front door,"—to maintenance? No; decidedly to construction.

9. How would you charge the item—"Erection of gatekeepers' lodges," where no lodges existed before? I would certainly charge them to construction.

10. How would you charge new rolling stock? The universal practice in Victoria, New South Wales, and South Australia is to charge to construction all new rolling stock.

11. Did you ever know any similar items to be charged to maintenance? No, never.

12. *Cross-examined by Mr. Miller.*—You have heard that there was a replacement of a portable engine by a fixed engine? Yes.

13. The portable engine required nothing to fix it, and no covering? No.

14. But with a fixed engine it is a necessary part of its equipment: it requires to be fixed in its site, and to have materials for its construction? Yes, I should say so, decidedly.

15. The fixed engine, being a substitution for a portable engine, is a replacement, is it not? Yes.

16. I would ask you from your experience if that was necessary to put the fixed engine to this work, why that would not be essentially a portion of the cost of replacement of the portable engine? I should say it would be additional work.

17. To enable the fixed engine to do the work that the portable engine was previously doing, could you do without it? I could not say.

18. But the new engine has to do the work of the old: does not your common sense tell you that all the accessories that are absolutely necessary with a fixed engine to do the work of another would come as a cost for replacements? No.

19. There is another item. Your evidence, of course, as we all know, is upon what you would call the general usage of the terms maintenance and working expenses? Yes.

20. Therefore you have nothing to do with any special contract? No, nothing at all.

21. If the parties agreed that something should be charged to revenue, and something to capital, your remarks have nothing to do with that? No.

22. There is an item here—"Trustees' remuneration (as voted at general meeting, 26th June, 1883), three trustees, each £157 10*s.*, for six years' service, at £26 5*s.* per year." We are told that these trustees were appointed for the purpose of managing what might be called a mortgage account? Yes.

23. Have you ever known in your experience such a charge being made and debited to any account? I have not known it.

24. Just consider. I am satisfied that that is only a fallacy of your recollection. I turn to an item called not merely revenue account, but net revenue account, of the Lancashire and Yorkshire Railway. You had experience in that? No, I had not.

Dr. Madden.—How can this be evidence? My learned friend is suggesting that some railway in England has made some eccentric charge.

Mr. Miller.—It gives evidence as to the universality of a practice.

His Honor.—But the witness knows nothing about England. His knowledge is confined to Victoria.

25. *Mr. Miller.*—Your knowledge of usage is simply confined to Victoria, and you know nothing about the practice in England? No.

26. As a fact, in Victoria have not many waggons and carriages been built to replace others destroyed or worn out? Yes.

27. And charged, of course, as replacements, to revenue? Yes, of course, as renewals.

28. And have not new rolling stock so got to replace the old, damaged, or partially worn out stock been used concurrently with the old stock it is intended to replace? I believe so.

29. Then you will use in one year or one quarter side by side the old stock, and in addition to that increase the number of pieces of rolling stock previously in use? I know very little about the outside. I can see certain waggons and carriages, but I am so busy in the office that I cannot say.

30. *His Honor.*—Is it not in your department? No; I am an accountant, and have nothing to do with it.

Mr. Miller.—Little as your knowledge may be, and therefore of the least use to us—

His Honor.—His knowledge of accounts is considerable, but you are now asking questions that are outside his province.

Witness.—We are so short of rolling stock that we use every truck and carriage we can possibly get.

31. *Mr. Miller.*—And it is within your knowledge that you use side by side the old stock and the new stock that is intended to replace it? Yes.

32. Then you have in the quarter of that year a natural increase in the number of rolling stock over the previous year? Yes.

33. Where there are replacements, if a carriage half as long again as, and with a greater carrying capacity than the old one, and of greater earning power—

His Honor.—As far as I understand, the Government allow for renewals. That is not raised.

Witness.—Suppose you put a new carriage on, and it costs more than the previous one, we do not charge the whole of that to revenue; we charge half to revenue and half to capital.

34. *The Attorney-General.*—You want to keep the accounts correct? Yes, we charge half to revenue and half to capital.

His Honor.—The Government have been more liberal to the Company here, and have not followed that rule strictly.

MR. CHARLES STEWART M'HARDY *called in and examined.*

1. *By Dr. Madden.*—You are Traffic Auditor of the Highland Railway Company, Scotland? Yes.

2. I believe you casually go around the world for your health? Yes.

3. And being a man of good taste, you dropped in to Hobart? Yes.

4. You have had a great deal of experience as to charging railway items in Scotland? Have had 25 years' experience as an accountant in Scotland and India.

5. Has your experience made you familiar with the meaning of the words maintenance and working expenses? Yes.

6. You have heard these various items discussed here in evidence? Yes.

7. Taking them in order "Hobart—Erection of store in Hobart yard," is that to be chargeable to maintenance or working expenses? I have not seen the store in question, but I have heard evidence, and have no hesitation in saying that it should be charged to construction and not to maintenance.

8. Now take the second item—"Building and covering chimney-stack for exchange locomotive shop, engine, and Cornish boiler, in preparing site for removal of brass furnace, &c." Should that also go to construction? Yes.

9. "Putting up porch in front of station." Would you charge that to construction. Yes.

10. How would you charge gatekeeper's lodges for the first time erected? These are also works of construction.

11. How is new rolling stock absolutely additional to that previously existing charged? Against capital, not to maintenance.

12. You have examined, I believe, the balance sheet and the various statements attached to it of the Tasmanian Main Line Railway Company? I have.

13. You have observed on the statement of receipts and expenditure the sum of £45,157 4*s.* 4*d.* standing to the credit of capital account? Yes.

14. What does that convey to your mind? As a difference between the amount received and expended.

15. That therefore it stands as a balance to the credit of the Company? Yes, unexpended.

16. *Cross-examined by Mr. Fooks.*—I understand you to say that your experience is limited as traffic auditor to the Highland Railway Company? No, my experience is not so limited. I have been both traffic auditor and accountant auditor, and I have served in these capacities both in Scotland and India.

17. Taking the railways in Scotland, they are constructed under general Acts of Parliament in force in Great Britain? Yes.

18. And in India they are done under some local Act? They are guaranteed lines. The interest on certain fixed amounts is guaranteed by the Government up to a certain fixed sum. When that is reached by traffic Government does not guarantee it. When the amount is not reached, the Government brings it up to the fixed sum.

19. You mean to say that they guarantee an interest on expenditure? Yes, on the amount expended.

20. Is that the case in all railways? I have not had experience in all railways. I am merely giving you my experience as to the railways I was acquainted with.

21. Are not some constructed solely by the Government? Some are and some are not, but the Government are gradually acquiring the railways by purchase.

22. In some iustances the Government purchase the undertaking from the Company? Yes.

23. You are familiar with the balance sheets? Yes.

24. Are you not aware that the forms of these accounts are prescribed by general Act of Parliament in England? Accounts of the undertaking are so; they are made up under the terms of the Statute.

25. When the general balance sheet for a period shows that it is expended, how can you see the Company have capital in hand? The accounts themselves show it.

26. There is £45,157 4*s.* 4*d.* under the head of net revenue. You see expenditure is there? Receipts are there, but not expenditure. I have seen it.

27. You see expenditure on the one side exceeds the whole £45,157 4*s.* 4*d.*? Yes, but it does not show that amount is expended; it shows the difference between the amount received as compared with what has been expended. But that £45,000 does not mean that it is represented by cash in hand or in the banker's drawer, because it is represented partly by sums not in hand, outside accounts, and so forth. A man's assets are not merely represented by cash in the banker's drawer, but by his stock in trade, book debts, and so on.

28. Then it does not mean cash in hand? No, but you must have cash or stock-in-trade for it.

29. It may mean something which is of the value of that which has been expended? Yes.

30. *By Dr. Madden.*—Do I understand you to say that there is unquestionably represented £45,157 4*s.* 4*d.*—it may be partly in money and partly in kind? Yes.

31. Do I understand you further to say that when the general account shows that this £45,500 partly in kind and partly in money, it does not specifically say that these various sums form part and parcel of that, but it must go to form part of it, because in any other way the accounts will not balance?—As an accountant in England, suppose it was expended as part of revenue, would that be a wrong expenditure? It all depends. If you were to expend it on revenue it would be a wrong expenditure. You must expend it on capital.

32. If you expend it on capital you have a capital asset? Yes.

33. And the balance of capital would be correspondingly reduced? Yes.

MR. WILLIAM LOVETT *called in and examined.*

1. *By the Attorney-General.*—You are Auditor-General of the Colony of Tasmania? Yes.

2. And as such it is part of your duty to make an annual examination of the Tasmanian Main Line Railway accounts? Yes.

3. Did you make an examination in the year 1883 of the accounts of 1882? Yes.

4. You took exception to some of the items as being wrongly charged against revenue? I do not think I made any exception in the accounts of 1882 to charges of any material amount. There may have been some small items. In 1883 I did make an exception.

5. In 1884 you challenged the accounts of 1883? Yes.

6. On what grounds? On the ground that they were not proper charges to revenue account or maintenance.

7. How did you think they should be charged? I obtained the accounts after some trouble from the manager of the railway in a return furnished and signed by Mr. Grant.

8. You had some trouble? Yes.

9. What passed between you? What do you mean?

His Honor.—It does not matter whether he had trouble or not, so long as he got them.

Witness.—Some correspondence passed between me and Mr. Grant, and it seemed to me that there was some misunderstanding between us. Mr. Grant did not quite understand what I wanted. At any rate that was the impression left by the letters which were written by Mr. Grant, and therefore, at my suggestion, an interview was arranged, and at that interview—I think it was in May, 1884—the whole matter was discussed between us. I pointed out to him, I think, that under the Audit Act of the Colony I was authorised to enquire into the transactions that took place between the Government and any one who had dealings with the Government, and I considered that the Main Line Railway Company came under the provisions of that Act. Mr. Grant, I think, contested that point with me for some time, and said I was simply confined in my examination of the railway accounts to the contract between the Company and the Government. He said to some extent that would, of course, guide me; but I felt that I had further powers than the contract appeared to give me, and I was bound to examine the accounts as directed by the Audit Act of the Colony. Mr. Grant then pointed out that he was willing to give any information I wanted that did not compromise him with his Directors in London. I think I pointed out then that I did not see that the information I required could compromise him, and it was finally decided upon that if I wrote a definite request to Mr. Grant the information would be obtained.

10. Did you write that letter? Yes. It was a short letter, dated June, 1884, requesting information in a definite form.

11. Did you make it clear to Mr. Grant during the personal interview what information you really wanted? Yes, I think so.

12. Is that the letter [produced]? Yes.

Read it.

5th June, 1884.

SIR,

REFERRING to the subject of the conversation held with me yesterday, I have the honor to request you will be so good as to furnish me with a statement of the cost of works during the year 1883 that did not exist in 1882. Respecting the cost of additional carriages and waggons, the price of which I did not think that it was necessary you should include in the return, upon further consideration I think it will be desirable also to include this information, as it cannot be arrived at approximately in any other way than from your records.

Thanking you for the courteous manner in which you have promised to meet my wishes,

I have, &c.

WILLIAM LOVETT.

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

Witness.—Yes, I can explain that.

His Honor.—Your memory is refreshed.

Yes. Objection was evidently taken by me from the fact of that letter being written. I had forgotten the item for the moment, but in 1882 the Government were negotiating in reference to the old disputes which had not been settled, and when a settlement of the old disputes took place in 1882, the whole of the items that had been in dispute were wiped out. Therefore, after 1882 it was not necessary to carry on any dispute that had occurred up to that time. For that reason no further exception was taken to the item.

13. *Mr. Miller.*—Yes, a complete settlement had been come to, I know, but were there then any disputes as to charging additional rolling stock to revenue instead of capital? Which disputes?

14. You say that they were negotiating for settling disputes up to 1882, therefore it was not necessary for you to enter into the particulars of disputes prior to that date? Certainly.

15. Had there been any disputes in the previous accounts as to the purchase of fresh rolling stock? I am quite unaware of it. I should like to explain why it was. It was this, the whole of the disputes were managed by the Government without reference to me. I simply performed my duty in bringing under

notice what I considered to be unfair charges. The rest was managed by the Government, therefore I had no more to do with the matter.

16. You refer now to the expenditure of 1882 and 1881? Yes.

17. To you, I presume, the balance sheets of receipts and expenditure were furnished at the ordinary quarterly periods? Yes.

18. And in the performance of your duty you attended at the office of the Company and required vouchers for that expenditure? Yes.

19. That was all done? Yes.

20. In the accounts for 1881 there were charges in relation to these items: will you say was there any objection made to that expenditure? No, because it did not appear in the accounts of the Company as expenditure for rolling stock. It appeared for renewals and maintenance, therefore the Audit Office had no opportunity of checking the account.

21. When you say the Audit Office had no opportunity of checking the expenditure, do you mean to say there were items placed in the accounts under headings, and that it was not your duty to consider if they were regularly charged? Of course I could not do so, if the real expenditure was hidden under different heads.

22. Well, we call it maintenance. Now was it not your duty to see that all expenditure was regularly put under its proper heads? Yes.

23. Did you discharge that duty? I did.

24. Was any obstruction placed in the way of your discharge of that duty? Not apparently, but practically there was.

25. Is it not the function of the Auditor, when ascertaining as to all those items, to make a searching investigation to see that the Colony is not imposed upon? Yes.

26. Did you look into the items of any expenditure to see if the repairs or renewals of old stock, and the purchase of new stock, were chargeable under construction? Yes.

27. You did? Yes.

28. And you passed them? I did. I passed them.

29. That is enough for me. Now from the very first account brought under your official notice, has there been the slightest thing in the form of objection to any account of receipts and expenditure? No.

30. In these opportunities of investigation have you ascertained that they accounted for every item pertaining to gross receipts and gross expenditure? As far as it could be seen.

31. You have not disputed it, have you? I have not. There was no apparent necessity.

32. Then every item of every kind, even down to such an item as the rent of the bar at the station, has been accounted for? Sir?

33. Well, I will leave that alone. As a matter of fact, has the Colony, up to the present time, received any deduction in the shape of profits from the amount of the interest? Yes.

34. What is the amount of the last deduction which the Colony has got the benefit of? There was a sum of £4000 for last year.

35. Then, as a fact the Company has not, in its charges to current expenditure, absorbed the whole of the profits?

Dr. Madden.—You can't go into that now. You are now going into last year's accounts.

Mr. Miller.—My learned friend has said that under the contention of the Company as to the meaning of the contract, the Government never could receive any profits.

His Honor.—We have the fact that they did receive £4000 last year.

Dr. Madden.—Yes, but we can't investigate that contention. There may be some question in reference to these accounts, and they may have to bring another action for it. I want the accounts if we go into that at all.

36. *His Honor.*—I understand the Colony has received £4000 and that there is no dispute. Is there a dispute? *Witness.*—It is passed.

37. *Mr. Miller.*—Is it disputed as to whether they are not entitled to more?

Dr. Madden.—If you go into that I shall have to do so also.

Mr. Miller.—There are unadjusted accounts, and it is contended that amounts properly belong to the Company. My learned friend contends the Government are entitled to more—that is my question.

Dr. Madden.—Any investigation as to any other dispute is obviously irregular, because it is matter after action.

Mr. Miller.—My learned friend said that the Colony would never receive a farthing of profits under the contract, and that the contract entitled them to share the profits. Now, in answer to that, I ask this gentleman, who is the Auditor for the Colony, if you have not received profit, and he says you have.

His Honor.—He has said they have, and what more do you want?

38. *Examination continued.*—You told my learned friend that in the examination of the accounts you were not limited to the ordinary examination, but that your powers were wider than under the general functions of the Auditor? Yes.

39. And your demand for information as to items that did not exist in 1882 was not a legal claim—was it not so? Perfectly.

40. That is enough for me. Now, in your letter under date June 4th, 1884, you say "Referring to the subject of a conversation held with you yesterday, I have the honor to request you will be so good as to furnish me with a statement of the cost of the works constructed during the year 1883 that did not exist in 1882." You wanted that information partly for the purpose of ascertaining if particular items were chargeable to construction, and partly in the discharge of your general functions as Auditor of the Colony? Yes.

40½. You dictated the terms under which Mr. Grant was to furnish that information? Yes, partly.

41. Did not Mr. Grant dispute your right to obtain the return in any other shape than under the terms of the contract? I don't know that my right was disputed. He hesitated about giving the information, but gave it after all.

42. He objected, did he not, that you were exceeding your functions in dictating the form of the return? Not in regard to the form.

43. Well, as to the information he was to give? He did not object to the form at all.

44. Did he not tell you that he had made the only return that, under the contract, he was bound to give you? I don't think so.

45. You say you pressed on him the necessity for this special information? I did. My object was this: there seemed to be some misunderstanding between us as to what should be charged to construction, and it was to clear that up, simply.

46. Exactly. Then you asked for this return as a matter of courtesy? No, as a matter of right.

47. Well, it is the same thing. Before he yielded to your demand in that respect did he not tell you that all you were entitled to under the contract he had already given you? I think he did intimate it in some way, but, at the moment, I cannot swear in which way.

48. Did he not tell you that your only duty, under Clause 10 of the contract, was to require any vouchers of payments necessary to test the accuracy of the returns? Yes.

49. And that they were all available for you?

His Honor.—That is not much use. He was clearly entitled to see all vouchers. It did not require Mr. Grant to say that which the law of the land told him to do.

Mr. Miller.—But he asked for something more as a matter of courtesy, for his own satisfaction, not as a matter of right or what we were bound to make, but as a supplementary account, nothing else. Then, as a matter of fact, he accepted your demand, in courtesy made, and gave you the statement of works existing in 1883 which did not exist in 1882? Yes.

50. And the same in the following year? Yes.

51. Now, in the very letter that contained that return, on the 29th August, 1883, in addressing Mr. Grant, did you not summarise very much what had passed before? You say "the chief clerk of the department having completed the examination of the Main Line Railway accounts for the period ending 30th June last, reports to me" and so on. Then you say, "it was found that all rolling stock placed upon the line prior to the year 1881 was paid for out of the Company's capital account, but that all the rolling-stock purchased and made during the years 1881 and 1882 was charged to revenue under the head of 'renewals.'" These remarks apply also to buildings and other erections. Although such new stock was not procured to replace any that had actually run into disuse, you contended that a certain percentage, say 15 per cent., of depreciation on the original stock should be written off yearly, and an amount equivalent to such depreciation allowed, to be paid out of revenue for new stock, buildings, &c., to be charged as renewals, and that allowance should now be made for the prior period in which such percentage has not been equalled by expenditure on renewals. You further quote Mr. Grant's contention, and ask for his confirmation to enable you to prepare your report for the Government. That was your communication? That was in August, 1883.

52. As a fact I assume you have not in any of your accounts made allowance for the depreciation in rolling stock? Yes.

53. Under that specific item? It has been allowed in this way—the whole material of the old stock has been sold, and the amount credited to revenue.

54. That is the only way in which depreciation has been allowed for? No, it has been allowed for by renewals.

55. But there has been no special head for charging this, or any allowance of a percentage for depreciation? No, certainly not.

56. Now after this, you say you did not enquire, because what was done wiped out what had been done before? Yes.

57. Then you wrote in September, 1883, and you recited all that was done before—however I don't want to go through the letter. In Mr. Grant's reply, on the 30th August, 1883, he says: "As to the power of the Government to control such expenditure, I entertain no doubt that the 5th clause of the Act of Parliament, 34 Vict. No. 13, places them in a position to officially ascertain everything that has been done, or is proposed to be done, on the line; while the 10th Clause of the Contract enables you to determine the exact cost of such works; and that, therefore, the Government are in a position to fully acquaint themselves as to the particulars of any improper expenditure of the revenue contemplated or performed, and consequently to take action to remedy the evil." * * "I would finally remark that the cost of the new rolling stock and station improvements paid for with the revenue receipts up to the present time, form a wholly inconsiderable part of the sum that any well established railway company would appropriate for depreciation and renewals during the length of time that this railway has been opened for traffic, the simple reason for such very small expenditure being the want of available funds, which difficulty, I trust, will never arise in the future." At that time it was a fact that the Government were holding back a considerable portion of the interest? At that time, a very small proportion.

58. This was your first experience in the auditing of railway accounts? Not quite; I had audited the accounts of the Western line.

59. You will admit you had very small experience of the accounts of private company's lines? I had no experience whatever beyond that.

60. From the returns that were made to you, you were aware, were you not, that prior to the year 1881 there was no revenue out of which to take the necessary expenditure? Prior to 1881?

61. Yes, up to the end of 1881 did not the expenditure considerably exceed the takings from the traffic receipts? I think so.

62. Then, up to the end of 1881 the difference was against the Company as far as the traffic receipts and expenditure were concerned? Yes.

63. So that there was nothing to take the expenditure out of? Yes.

64. You know something by this time about the railway? Yes.

65. Do you or do you not know that the depreciation during the earlier portion of the time would be moderate in proportion to the depreciation over the later years, when the line was working increased traffic? Yes.

66. *Re-examined by the Attorney-General.*—With regard to the amounts charged to construction, Mr. Lovett, is it a fact that the very large amount, £76,764 4*s.* 9*d.*, was charged to construction account? I don't understand.

67. You were asked whether the depreciation was not small in the earlier years? Yes.

68. Was not the large amount of £76,764 4*s.* 9*d.* charged to construction in those years? Yes, in the accounts.

69. And in the year 1878 is not the further sum of £19,720 9*s.* 3*d.* charged to construction? Yes.

70. You have been asked if you did not pass, as a matter of course, everything under the head of renewals: what did you do? What was that.

71. You were asked if you had not passed everything which Mr. Grant put under the head of renewals in these accounts. Is that so, or did you do anything else in regard to them? Yes. I referred the correspondence to the Government, and left them to deal with it.

72. *Mr. Miller.*—I would ask if it is not a fact that the considerable amounts charged to construction in the earlier years—were they not, in point of fact, in settlement of the purchase of land in those years. The amount paid in 1881 was in settlement of the contractors' accounts, and large amounts which had been incurred previous to 1881; many were items which should have been paid during the years of construction? No, not altogether; but many were items incurred previously to 1881.

73. *His Honor.*—Really for improving the line? Yes.

74. *His Honor.*—Was any of that money used for the purchase of rolling stock? Some of it was.

75. *Mr. Miller.*—Was not the whole of this expenditure of £115,373 odd payments in adjustment of accounts between the Company and the contractors?

76. *His Honor.*—Was the whole of the £76,000 or more paid on account of 1881 applied for winding up the financial matters connected with the contractors? No, only a portion of it was.

Mr. Miller.—If there is any obscurity on the point we can of course recall Mr. Grant.

77. *Re-examination by Attorney-General continued.*—Can you say as to whether in the five years' payments, amounting to £115,000, whether that included rolling stock? I think the amounts were all for construction items, rolling stock, rails, and other material.

78. *His Honor.*—Then this £115,000 did include rolling stock? Yes, in the years previous to 1881.

79. *Mr. Miller* said if there was anything requiring to be made clear on this point, he would ask His Honor to recall Mr. Grant.

The Court adjourned until 2 P.M.

Afternoon Sitting.

The Honorable ADYE DOUGLAS *examined by Dr.* Madden.

1. What is your name? Adye Douglas.

2. What are you? Well, I am a gentleman at large at present.

3. I believe you are a Practitioner on the Rolls of the Supreme Court in this Colony? Yes; but not in practice.

4. Happily for you, you can now draw out of responsibility in this case, and look down upon us from an altitude. You were Agent-General, I believe? I was.

5. In London? Yes.

6. Well, under instructions from the Government, did you communicate with the Directors of the Tasmanian Main Line Railway Company? Yes.

7. More especially in relation to the items under consideration in this case? Some of the items.

8. That is correct. We need not go into the whole matter so far as concerns the items particularly. Did you communicate with Colonel Grey and the Board of Directors? With both Colonel Grey and the Board of Directors.

9. When you stated the claims of the Government as to these items, what did you do? In reference to the particular items no doubt very little was said, excepting that it was acknowledged that a large proportion of the claim, amounting to some £10,000, was fairly claimable as to capital account; but that about which we were not certain should be left to arbitration. But the difficulty with the Company was what should be done for capital.

10. Then, as I understand you, as regards £10,000, part of the items, it was admitted at once that they were beyond controversy, and that as regards the balance of £4600 odd that should be left to arbitration: was that so, or did you come to any division of the particular things? It was to be left to arbitration, and the arbitrators were to settle between them which was fairly chargeable to capital and what would be taken as working expenses.

11. I believe that between you what was known as a suggested arrangement was arrived at? Completely. It was settled and signed.

12. As between yourselves, as the plenipotentiaries of the two parties, then you settled and signed an actual agreement? Yes; I signed for the Government, and Colonel Grey for the Company.

13. Now, did that agreement require confirmation by anybody? It required first to be confirmed by the Government, and secondly by the Legislature.

14. Is this a copy of the suggested agreement? (Exhibits papers.) Yes, I believe that is a copy of the suggested agreement.

15. As a matter of fact, when the Government considered this agreement they declined to accept it, and the whole of your negotiations came to an end? I don't believe the Government here ever considered the agreement particularly.

16. But, as a matter of fact, the negotiations came to an end? Yes; they saw this action pending and they put an end to the agreement.

17. *Cross-examined by Mr. Miller.*—I presume, Mr. Douglas, this was an arrangement in the light of a compromise on both sides? Yes, a compromise arrangement.

18. Embodying a material abandonment of claims? No, not any material abandonment of claims.

19. Was what passed between you and the Directors reduced to writing in this instrument? In substance it was.

20. Then this is the written contract into which all that passed was fused? Everything was supposed to be settled by this.

21. And that recites at the commencement, "Whereas the Government of Tasmania claim that certain expenditure made by the Company ought not to have been debited to revenue, but should have been treated as capital expenditure, and have retained out of the interest guaranteed by the Government the sum of £14,627 1*s.* 6*d.* or thereabouts in respect of such expenditure." Does not that recite that so far the Company is concerned they had a right to charge every farthing to revenue? They claimed under these words, "And whereas the Company having closed their capital account contend that they are entitled to charge to revenue expenditure of every description contemplated by the agreement between the Government and the Company of the 15th August, 1871, and otherwise fulfil their obligations thereunder"—is it not recited and assented to by you under your hand that whether under other circumstances it would be chargeable to capital or revenue, that under the contract they claim to charge it to revenue? No.

22. But what is the virtue of language, then?—they contend that they are entitled to charge it to revenue. *Witness.*—That will not be good enough. I won't admit that.

Mr. Miller.—I know you won't. You were never good enough for anything. You are not Premier of the Colony now.

His Honor.—Well, Mr. Miller, we don't want that.

23. *Mr. Miller continues examination.*—I ask you can there be virtue in language if that is not what is meant, and do the Company not contend that they are entitled to charge to revenue and expenditure works of every description claimed by the Company by the fifteenth article? The two things are to be read together. The Company contended that they were entitled to make charges for maintenance to revenue. Objection had been taken to those charges. This agreement sets out that the Company would forego the charges if provided with capital.

24. Is it not a fact that the Company claimed that such and such things should not be treated as capital charges, but charged to expenditure?—does it not rest with the other side to show they are capital charges?—the Company contend that they should be debited to expenditure? The recital distinctly says what was intended; it merely says the Company contended they had the right; the language expresses itself.

25. This agreement, does it not protect the rights of both parties? It is a compromise: it failed, and it should have been secured. Did it not contend that the items on one side should be charged to capital and the other side to revenue? Yes.

26. That is all. Now, I give you the next recital—"And whereas litigation is pending between the Government and the Company with reference to such dispute, and it is expedient in order to avoid the delay and expense thereof, and to put an end to the same, that the following arrangement should be come to," and so on. Is that not that it is expedient that each party should come to a compromise? Yes.

27. For the purpose of this agreement capital expenditure shall be held to mean and include outlay of the following description only:—1. Extension of the Company's system. 2. Duplication of existing line. 3. New buildings. 4. Additional rolling stock. Is not that the limitation of that expenditure, and is it not expressly made for the purposes of this agreement only? Hardly.

28. It must be contrary to every rational contention, then; but the parties were to be bound by it? Hardly. It was the intention to complete a compromise if possible.

29. I ask again. The Company were in a difficulty to raise additional capital—they wanted money? Yes, they wanted money.

30. Is this not the contention that has been set up here—that the capital expenditure was for the benefit of the Company; that the Colony might be charged twice over; that the Company would get the benefit of the increased profits, and that they must get the ultimate profit if the property was taken over by the Colony? No such thing. You are mixing up two things. The arrangement made was that we should come to a compromise, if possible. There was much negotiation, and, after considerable delay, this was agreed to. The particular ground that animated the Company I don't know, but one was the want of capital.

31. Was it not contended by yourself, as representing the Colony, that you might have to pay off these items in the one case out of contract profits; in the other, in the improved value of the line in the event of purchase? No, not in England, the point did not arise. I have contended it with Mr. Grant over and over again in the Colony, but it did not arise in England. In the Colony it is one of the points that has been raised between us.

32. Now, listen to the 7th Clause:—"If, however, the Government shall exercise their option under the original contract to purchase the Company's undertaking, then any portion of the said loan or loans which shall be then outstanding, and shall not have been previously paid off, shall be paid off by the Government, or such other arrangements made by the Government as shall be satisfactory to the lender or lenders; and any then existing works forming any part of or included in the said undertaking which shall have been created, produced, or procured through or by means of the expenditure of any portion of the moneys raised by a loan or loans as aforesaid which the Government shall so pay or satisfy, shall be excluded from consideration and valuation in fixing the price to be paid to the Company in accordance with the said original contract." Now, was it not part of the arrangement that they were to have a guaranteed line, out of the profits of which they were to pay for works of construction, but whenever, if ever the Company's property was sold, the Company was to have the benefit of the expenditure? Yes, limited to the amount of expenditure which the Government paid for interest on their loans.

His Honor to Mr. Miller.—You read from the agreement, and you ask him to say yes.

33. Under this, then, the Company, in consideration of the abandonment of its claims up to that time, instead of being recouped the £10,000, they were to have the benefit of the Government's guarantee for a sum of money not exceeding £50,000? No, that was not the agreement; the guarantee was for the interest on the £50,000.

34. Well, it is the same thing. The interest would have been guaranteed on a loan up to £50,000: that is correct? Yes.

35. They could then go into the money market and get the benefit of the £50,000? Yes; but Government did not carry it out.

36. Oh, we all know that, and the Government called you all sorts of nasty names on account of it. I turn to this agreement. You say it was to be recommended by you to the favourable consideration of the Government; but was the agreement equally to be confirmed by the directors of the Company? This is the way in which it is signed: "Approved and recommended for the adoption of the Government.—ADYE DOUGLAS. Approved and recommended for the approval of the Company.—F. D. GREY." As far as the arrangement was concerned, it was as much a provisional communication on one side as on the other? Quite so.

37. I will ask you, have you not yourself in public—have you not yourself on all occasions openly expressed the opinion that the proposed compromise was one eminently beneficial to the Colony? Most decidedly; there cannot be a doubt about it.

DR. MADDEN said that was the defendant's case; and he thought he should now be enabled to redeem the promise made in his opening address, and that if their sufferings were greatly prolonged it would not be at his hands. It would be a poor compliment to them, after the close attention they had bestowed upon the hearing, to endeavour in any lengthy address to impress the points of the case upon them. He felt sure it would not be obliterated from their memories for a long time to come, but whatever inconvenience they might have experienced, there was pleasure in the thought that their compensation would be that they had done their duty. They would understand from what they had heard, that the issue now was a narrow one indeed; and if his learned friends had dilated at great length on the various matters involved, it now all depended upon what was necessary, and, in short, the case had been brought down to the narrow question as to whether these items in dispute were fairly chargeable against maintenance or working expenses, or against capital. That was the only question. His Honor would tell them what the terms maintenance and working meant. He (Dr. Madden) would tell them that they bore just the ordinary meaning that would attach to them in their common intercourse with one another in every-day business. The question was did these charges fall within that meaning? In the first place, they would give their own opinion from their knowledge of language in arriving at a conclusion on the question. Secondly, they were strengthened in arriving at a conclusion by the evidence of men who have to give attention to items such as these, and who have been in the habit of placing things in their proper place, and who know what their proper place is in relation to railway accounts and business. And thirdly, it would be a great assistance to them to see the view which the plaintiffs themselves had taken. These were the three points he would commend to their consideration. What was the meaning of the words according to their views, and how were they strengthened by the evidence of expert men? And he could show them that they were strongly strengthened by the admissions of the plaintiffs themselves. There were two or three graver arguments or clouds that hung about the case, but they could easily be cleared away. It was contended, and evidence had been called to show, that the expenditure was only reasonable and necessary for carrying on the railway. According to the argument of his friend, Mr. Fooks, the issue would have been reduced to this—that the Company could charge to revenue any mortal expenditure incurred on the Railway so long as it was not dishonestly or maliciously made; that the Company might take the revenue to gild the piles under the bridges, or to build the gatekeepers' huts of marble, or to have them painted and decorated by the leading masters, or any nonsense of that kind, and the Government could not prevent them. His learned friend said if they did anything of that sort that the Government might step in and have an injunction in equity to prevent them, and that was the only way in which they could interfere. That whatever was considered necessary for the railway the Company were entitled to take it, although it might only go to build up a splendid property and to enrich and fatten them; no such argument could be admitted for one moment. But it was said it might be assumed that the Company would only construct such works as were reasonable in consequence of their increasing traffic, and would only get such things as were necessary in every case. Well, take the two men who were partners, as he said before, in a brewery, one finding the capital and the other managing the business. Say a new building was wanted to enable them to carry on the increasing business they could attract to themselves: he would assume that that was necessary in the same way as new accommodation on a railway. They had then an extra pocket of hops that would be necessary also, but in that case the cost would be charged to working expenses in the ordinary way; in the other case the building would be charged to capital. These works might be reasonable in every sense, but that argument could not have any effect in determining the present issue. He would come now to the items in question. As to the first item, as far as he could follow the cross-examination, it seemed the Company were no longer disputing that the item was chargeable to capital; and while he thought of it he would deal with his friend Mr. Fooks' argument as to capital account. Mr. Fooks said, instead of fighting on the principle, the Government were intruding on the Company, and insisting upon their keeping a capital account. They could keep what accounts they liked, provided they did not take the Government's money and put it into their own pockets by entering to working expenses works that would stand for a very considerable time to the benefit of the Company, and should therefore be paid out of a different fund than that in which working expenses would be debited. Well, as he had said, his learned friend no longer disputed that the Hobart yard store ought to be carried to capital account, but they said in this case it ought to be

shared with the Government, and not altogether paid by the Company. The next item was the only one to which he had heard argument addressed by cross-examination—Building the covering and chimney-stack for exchange locomotive shop, engine and Cornish boiler, and preparing site for removal of brass furnace. Mr. Miller concluded that because this new engine had been purchased, and it was in itself a substitution, that every mortal thing which was bought in connection with the new engine was tarred with the same brush and became a part of the same substitution. Instead of the dog wagging the tail it was the tail wagging the dog. Say one bought a horse. That would in ordinary course be charged to capital account, because the purchaser hoped that in the usual course of things the horse would serve him for a series of years. Of course, like the engine, if one made the horse stay out in the open air without attention it would die, and so with the engine, but it would keep on working all right up to a certain time. It was a very wise and proper thing to do for the protection of the horse to build a stable, but it was not essential. How could the owner say that the stable was part of the horse, or that it belonged to it. The horse would die, but the stable would last a good while longer, and answer for other horses ; and why should it be said to belong to any particular horse ? In the same way, why should the shed be called belonging to any one engine, when it might be used to store many other engines? It seemed an absurd contention. He would now pass on to the evidence of the experts, and he asked the jury to array them on either side. On the side of the Government he claimed to have the evidence of the witnesses both for the plaintiffs and the defendants, Mr. Patterson, Mr. Lavater, and Mr. Mais, subject to the one argument to which he had already referred, and which was no longer available, since the engine which was a renewal of the old engine was not included in the item. In connection with this engine, Mr. Grant had suggested that they had not been writing off depreciation of stock for wear and tear, and this should be taken into account ; but what they had done was this—they had waited until the old engine was worn out and then got a new one. In other words, instead of writing it off bit by bit, in accordance with the usual practice, they had written it all off at once when it became useless. If they eliminated this from Mr. Grant's evidence, he also was a witness for the defence. All these admitted that new work should be paid for out of capital. They then had the evidence of Mr. Smith, a man of great experience, brought up in a school which made him perfectly familiar with such items as those in dispute. His evidence was as plain and clear as the light that shines, that every one of these items was a charge to construction and not to maintenance. It was true his learned friend put some documents into his hand with the intent to shake his evidence : like something else that was called to curse, they remained to bless. They really all amounted to this. Mr. Smith was brought to a period with which he was familiar, and though at first he appeared to hang in doubt when questioned, as soon as he saw the documents he knew instantly what they referred to. The items that were charged to revenue were the renewals of that day ; but when they had to buy new stock they had to ask the shareholders to pass a special resolution to give permission and capital for that purpose. The engines that were bought were renewals, and the £75,000 was merely for engines for which a resolution was asked in order to entitle the directors to buy them with the capital in hand or to raise new capital. On the very face of paragraph 6 of the London and Great Western Railway Company's Report, December, 1883, it states :—"The outlay on capital account during the last half-year amounts to £329,800, of which sum £137,144 has been incurred in the supply of additional rolling stock. So it could be seen additional rolling stock was paid for out of capital. Again they say, "at the conclusion of the business of the half-yearly meeting, a special meeting will be held for the purpose of creating additional capital required to execute the works which have already been approved by the proprietors, and sanctioned by the several Acts of Parliament. The amount proposed to be created is £742,830 of ordinary stock, which the directors propose shall be issued as required for carrying on the works "—showing that Mr. Smith's evidence was corroborated—that very evidence his learned friend wished to damage. He would say, he never saw a witness whose evidence should more content a jury. It was clear and precise ; and Mr. Smith was a man of he might say world-wide fame in railway matters, and must at any rate embody two faculties—one of perfect reliability, and the other of thorough knowledge of his business. They then had the evidence of Mr. Back, who had been brought to the Colony for special reasons, certainly not because he was a noodle. His evidence was quite clear on the subject, and he was perfectly satisfied that all the items in dispute were chargeable to construction, and would be so entered on any English railway. He had also been an accountant, and was now a railway manager, and had ample opportunities of gaining the knowledge required. Mr. M'Hardy, a gentleman who came quite by accident, said, as an auditor of a Highland railway, it was perfectly clear these were capital charges and not maintenance or working expenses. Then they had Mr. Lund and Mr. Kent, who were also quite clear on the subject. In addition to this they had the evidence of another man, a central figure in railway matters, whom the people of England were only too anxious to get back again—viz., Mr. Speight. It was true they had not his evidence on oath ; but when a country like this submitted a question to a man of his position, the last thing he would do would be to deceive them in the matter, and he thought they might regard Mr. Speight's evidence as having all the authority as if taken on oath here. Mr. Speight said, "The whole of the expenditure enumerated on the list submitted to me, amounting to £5987 7*s.* 11*d.*, with the exception of £125 19*s.* 2*d.* for restoring the damage done by fire at Bridgewater, is properly a capital charge, and would have been so provided by a Company with any capital at its disposal." The account which he excepted was for an item, now struck out, for replacement of some edifices at Bridgewater, waiting-room, &c., which had been destroyed by

fire. His railway mind was alive to the weak point in the accounts submitted to him, and he says "That is not a Government charge;" and the Government immediately acted on his advice, and paid the money. The Government, therefore, had this valuable evidence of Mr. Speight. Now, as against all these witnesses, what evidence was there on the other side? He had drawn into his net the evidence of Mr. Mais, subject to the one argument, Mr. Lavater and Mr. Patterson, whose evidence was quite as clear as that of any witness called by the Government themselves. Against this they had the evidence of Mr. Price-Williams, a gentleman of experience in his own business, but that had been somewhat remote from the management of railways, and his evidence must be to a great extent theoretical, because he had told them that since 1861 he had not had any experience of that kind at all. He said, "Of course I have these matters constantly under my eye, and I can form an opinion for myself." Well, if he could, he stood out alone against all these railway men who had the actual management and working of the lines. He was standing full in the face of those who were called on his own side. It was a case of evidence rather too good for the side he was called for, and he would have come all that way over the briny ocean to no purpose; of course, he gave his evidence like an honest gentleman and what he believed to be right, but they all had their little weaknesses and must be partisans, say what one would. He was only a human being, but it could not be partisanship which brought every one of the witnesses on both sides before the jury. They could not all be partisans when they said "black" and Mr. Williams said "white." It would therefore be well to lay him on one side and let him go back to England and express his opinions there for the benefit of railway men in the future. The principles of common sense and fairness must prevail against him. With regard to Mr. Grant's evidence, he hardly knew where he was, because Mr. Grant used to yield him all he asked and then turn on him in a flash and assail him on his right flank; then when he faced round to meet him, Mr. Grant would suddenly appear on the left side. He was quite certain Mr. Grant would not fail as a diplomatist. He, as a railway man, felt pricked on straight forward, but as a diplomatist he thought he should go from one side to the other. He was like a chessman, and appeared to think "I can't go this way like a queen, but I can move from side to side like a castle;" and he, Dr. Madden, had to shift him, like a castle, back again. He had formed a very considerable regard for Mr. Grant, and thought they might fairly say that gentleman found himself in a very awkward position as representative of the Company. He could not go right against these men, and therefore took up the position he did. These were the opinions of the various experts, and it seemed a very strong mass of evidence indeed. And that was the one question to be decided, whether these items in dispute came under the heading of maintenance and working expenses, or of construction. Another class of evidence they had not come to yet—namely, the evidence taken in Victoria by experts there. Their report was nonsense on the face of it. Two of the experts were engineers. One was a man of great might in regard to mud-punts and bridges and matters of that kind, and had nothing to do with railways. The second was an employé of Messrs. Cornish and Bruce, who were contractors for the Victorian Government. One could understand the reason he gave his evidence. He adhered to this, that if one had anything that was useful, that went to working account, but if anything that was merely ornamental, that went to capital. This evidence did not merit sincere consideration at all. His learned friend, Mr. Fooks, had already told them that the evidence of the Victorian Commission was absolutely nonsense and twaddle, and he, Dr. Madden, agreed with him as to that. Then there was the evidence of Mr. Gordon, who also had had nothing to do with the management of railways. He was unable to give any greater evidence on this point than any one in the Court of ordinary intelligence. It amounted to nothing, and was scarcely intelligible. Well now, that being the evidence of the "experts," he would next call the jury's attention to another matter. They had these facts before them—that between the years 1877 and 1881 Mr. Grant himself, conducting the business of the Company, charged items of this kind and class to capital account. In that he did not think there was much that was inconsistent; but in these accounts Mr. Lovett told them were included new rolling stock, and precisely the same kind of items which the Company now said ought to be charged to maintenance.

Mr. Ritchie: That is incorrect.

Dr. Madden: There was this large item of £76,000 odd carried to capital account in 1871. His learned friend wanted to make out this was incorrect. Mr. Lovett said even in this there were some items which were due to rolling stock; but, in addition to this, in 1878, '79, and '80 items also appeared in the accounts including similar charges to those in the list, therefore there was an end to that contention. Now, how came it that if these charges were so entered then they were not so now? The railway was then earning its revenue and doing its work. If they were chargeable to the revenue now they were chargeable then. In a letter to Mr. Grant, Mr. Lovett, the Colonial Auditor, said—"It was found that all the rolling stock placed upon the line prior to 1881 was placed to capital account, but that all rolling stock in 1881 and 1882 was charged to revenue under renewals." Mr. Grant, in his reply, stated—"You correctly state the facts of the case." Well, one of the facts was this—that all the rolling stock placed upon the line prior to 1881 was paid for out of the capital account. Mr. Lovett said it was, and Mr. Grant said, "Yes, you are perfectly correct." His learned friend said he was wrong, but this proved that he was right. Mr. Lovett explained that the meaning of the latter part of his letter was this: he found that the Company had been purchasing new rolling stock, and, on making enquiries, he was told they were "renewals," and, taking this explanation, passed the accounts. In the following year, 1882, he found that there was a still further addition of so-called "renewals," and began to go into the

matter. As a consequence, he explained matters to the Government, and this dispute arose. But what did Mr. Grant say? He said, "That is true, but the difficulty is this: our capital account is closed. I admit that they are payable out of capital account." Mr. Grant never said they were not; but that the account was closed, and, unless paid out of revenue, they could not be paid at all. To begin with, their account was not closed, and, even if it were, it would be no difficulty to reopen it; but their capital account was not closed, because Mr. M'Hardy said they had £46,000 capital. He (Mr. M'Hardy) said it was quite true the Company had brought it into revenue account, though it was possible they had paid some of it out legally or otherwise; and if the directors had spent it illegally the trustees were still liable—the capital still existed in point of law. The trustees were bound to replace it. They might still go to the Government and get leave to borrow the money under the Act by which they were registered, but if they did not do this, well, they must wind up their affairs. In this they were in the same position as an individual. They could not say, "We are a Company, we have got no money, and how are we to carry out our obligations?" The reply would be, "get your money like other people, or you must wind up the Company." We are dealing with the legal question. If they could get it conveniently so much the better, if not it was their own look-out. Well then, that led to another matter under the same heading of admissions by the Company themselves. This brought them to the evidence of Mr. Adye Douglas, who, as the then Agent-General in London for the Tasmanian Government, went to see whether any reasonable arrangements could be made with the Tasmanian Main Line Company. Mr. Douglas was there to maintain the rights of the Government, and he did so. Well, the directors at home at once agreed with Mr. Douglas that as far as the £10,000 was concerned that was beyond controversy. It was only right to point out, however, that this agreement referred to was incomplete, and therefore must not be looked at as an agreement. Both parties were undoubtedly bargaining for a thing which never came to pass. But, in the light of this proposed agreement, could the jury think the Company really believed that this amount was not attributable to construction? The Government argued that it was, and the Company did not say it was not so, but that "whereas the Company have closed their capital account" they were entitled to charge it to revenue. The Government here was contending that these items were chargeable to capital. The Company did not say "it is not chargeable to capital," but they said "we have closed our capital account, and it cannot therefore be charged out of that account, but revenue." The view the London directors really took of it was the view Mr. Grant took of it in the Colony, and then they went on to decide that "for the purposes of this agreement capital expenditure shall be held to mean and include outlay of the following description only:—(1) Extension of the Company's system; (2) duplication of existing line; (3) new buildings; (4) additional rolling stock;" and again, "£10,000 of the said sum of £14,627 1*s.* 6*d.* shall be deemed to have been expended on capital account." If the facts were not as all the witnesses called for the Government had testified, would not the Company have kicked against such a suggestion as that made in the agreement? They would have said, "how can you expect us to do such an irrational thing?" But they said nothing of the kind. They admitted that £10,000 should be deemed to have been expended on capital account, and then they agreed that if the Government would guarantee interest upon a loan of £50,000 they would at once hand the Government £10,000 in payment for those very items now in dispute. They saw there was no get-away from it, and they were willing to negotiate for a compromise. Mr. Douglas told the jury that before this agreement was drawn up and put into writing the Company did not even dispute the matter, and the balance of £4000 odd was to be submitted to arbitration as to how much should be treated as capital and how much maintenance. He thought this brought him to the conclusion of the observations he felt called upon to make to the jury. The case involved much interest and an important principle, but had dwindled down to a very small question to be decided upon, and he thought he might very safely leave the matter in their hands. They ought to be hospitable to a foreigner, but, of course, they must not be hospitable in a jury-box, and they must give the foreigner all he deserved and no more; and, he might say, he had never seen a case which came before a jury so lean of evidence for the plaintiff, or so distinctly upheld by the evidence for the defendants. Once more he had been reminded of a matter which he had forgotten in his former address, namely, those trustees' fees. His learned friend, Mr. Miller, would, of course, be eloquent on these trustees, but he did not think any one could seriously entertain the idea that these fees should be charged to the Government.

Mr. Miller asked that Mr. Grant should be allowed to be asked certain questions to settle some ambiguous points, but was ruled out of order.

Mr. Miller then addressed the jury. He said his learned friend and leader, Mr. Fooks, had allotted to him, as his portion of the task of putting this issue before them, the duty of replying to his learned friend, Dr. Madden's, address. Now, he thought he would have their concurrence in the opinion that the last thing in the world Dr. Madden need have done was to apologise for the length of time he had occupied in those able, those eloquent, nay, those brilliant speeches, to listen to which had been an unusual intellectual enjoyment. For himself (Mr. Miller) his task would be—while admitting the excellence of his learned friend's work as an artist—to submit to them that, as an answer to the plaintiff's claim, it failed, not because it was not most plausible, most telling, most effective, as he had structurally designed and placed it before them, but because it lacked the simple element of being founded on true premises. It was a picture he had placed before them. He had used the most glowing colours in it; he had carefully painted and decorated the aims of the Company in lurid shadow, and all the most glowing harmonising tints of the sunrise and sunset had

been used to induce the jury to believe that such conduct on the part of the beneficent institution, the Government, in their observance and liberal performance of their obligations towards this Company, never before existed. The picture reflected the genius of the artist, but was not a picture of the landscape. It was his duty, with a much more homely brush, to put before them the real aspect of what, he contended, was the true issue before them. Here, he thought, he might pause to congratulate the little Colony of Tasmania on the legal acquisition caused to it through this issue—the acquisition of Mr. Fooks, bringing with him his acknowledged rank and station in the mother country; who had been, in recognition of his great talents, gracefully admitted by His Excellency the Governor, acting under the advice of His Honor the Chief Justice, to the same position in this Colony as he occupied in England. His learned friend, Dr. Madden, they all knew of him by reputation, and recognised that he was one of the most distinguished members of the Victorian Bar, a native of Victoria, and now they had had an opportunity for themselves of ascertaining how worthily he had attained that reputation of which they had only previously heard. To both these gentlemen he extended the hand of fellowship and welcome. His learned friend, Dr. Madden, had alluded to the introduction of Mr. Fooks into the case, and spoken of him as being a sort of "dry nurse" to Mr. Grant, and by implication to those with whom he sat side by side. Of course he (Dr. Madden) was far too courteous to allude to him (Mr. Miller) and his friend except by implication; but if Mr. Fooks was a "dry nurse" to the railway Company, he was still more a "dry nurse" to the learned counsel. When his learned friend, the Attorney-General, instructed Dr. Madden to throw over that harmless little babble, he should have considered what a very brittle thing his own habitation was. Mr. Fooks was sent out by a foreign Company, of whom he was the trusted adviser for many years. They knew nothing of the colonial bar, but they knew that he was in full possession of their views of the contract. They knew it was most desirable, if unfortunately they should differ from the conclusion arrived at by the Court, under the direction of the learned Judge, that it was all essential in discussing the question before a proper tribunal at Home that the Company should have the help of an experienced man by his personal visit. But the Attorney-General—the head of the colonial bar; the draftsman of our legislature; the political champion; the legal champion of the heads of the Colony in every court—did he want a dry nurse?—was he not equal to the task of conducting the case, the issue of which was a dry interpretation of a legal contract? Would his colleagues not entrust to him while they entrusted the whole of the interests of the Colony at large to him in association with themselves, would they not entrust to him so small a matter—so comparatively small a matter—or was it that his own rare modesty, which under-estimated his own efficiency for the position he occupied, that led him to introduce a Victorian barrister, and to submit, practically, the entire conduct of the case to him? Such modesty was very becoming; but he was afraid the taxpayers of the Colony would find it a little costly.

The ATTORNEY-GENERAL: You will have to pay for it.

MR. MILLER: Yes; and everyone else in the Colony will have to pay for it.

HIS HONOR: You have been a quarter of an hour and have not touched the case yet. It seems to me that it keeps the jury unnecessarily long in the box.

MR. MILLER: I am replying to an observation that was used by my learned friend, and I trust that the latitude of the Counsel of a foreign Company will not be restricted.

HIS HONOR: I am judge of what these proper restrictions are, and they will not be limited within proper bounds; and we have now a discussion that is utterly outside the question we have to decide.

MR. MILLER: In every case there must be matters outside the question.

HIS HONOR: I am not prepared to hear them.

MR. MILLER: We are not accustomed—

HIS HONOR: I have decided, Mr. Miller.

MR. MILLER: Will you decide not to hear me?

HIS HONOR: What I want you to do is to get to the issue.

MR. MILLER: But no such restriction was placed on Dr. Madden, and I say I am entitled to the privileges extended to him.

HIS HONOR: Dr. Madden did not exceed his privileges.

MR. MILLER: I don't think I am exceeding them.

HIS HONOR: I throw it out to the Counsel that we are now going away from the very point at issue. The jury sat here to-day and would like to get to the point, which you will never do if you proceed in that way.

MR. MILLER: I claim the absolute right to reply to the objections that are made by the other side, and should not be restricted in point of time as to replying to those objections. I do respectfully submit to your Honor that I shall be embarrassed in the conduct of this case if I do not get fair latitude, before I come down to what I am perfectly prepared to hear is one of the narrowest issues that have ever been brought before the Court, if I am not to follow my learned friend and reply to the objections that he has used to the jury *seriatim*. I cannot do this if your Honor is to watch and take stock. Still, I must ask in the interests of justice and my clients to do this.

HIS HONOR: You may proceed, Mr. Miller. We all get a little warm at times.

MR. MILLER: Yes, your Honor, we have one opinion in common, but sometimes a different way of expressing it. I must have my little joke.

MR. MILLER (proceeding) said he was going to suggest that if Mr. Fooks was a dry nurse his

learned friend must have had a wet nurse, because he had taken all the sustenance from Dr. Madden, having left the whole conduct of the case to him. Dr. Madden had been his wet nurse, and no one born could ever wish for a more comfortable and skilful wet nurse. He would then pass to another thing, and that was to make an expression of regret that his learned friend, Dr. Madden, should have been instructed to attempt upon incorrect data to heap embarrassment and ridicule on a gentleman of such eminence in his profession as Mr. Price-Williams—to impute to him the observation "fad." To a gentleman not accustomed to give evidence, this sort of attempt was embarrassing, and calculated to lead the jury to undervalue his testimony. Mr. Price-Williams was a gentleman of very extended experience, whose works were considered of authority. They knew that the attempt failed in consequence of the prompt and manly rebuke administered by Mr. Price-Williams himself, and he (Mr. Miller) regretted that such an attempt had ever been made. He was approaching by degrees to the very issue, so that when they finally came to consider that they would not be distracted by extraneous considerations at all. He also regretted the attack that his learned friend was instructed to make upon Mr. Grant, an attack that was rather indicated by the tone of the cross-examination than by the language that was used with reference to Mr. Grant's evidence. Between the time of the cross-examination of Mr. Grant and the time he commented upon his evidence he had had an opportunity for a personal interview with Mr. Grant, which he had never had before; but he had had something more valuable still than that; he had the opportunity of going through years and years of dreary, weary correspondence, the perusal of which during that forty-eight hours had conduced to that mitigated opinion of Mr. Grant that he had that day expressed. His learned friend would have learned the cruel embarrassed position in which Mr. Grant had been placed as Manager of this Company, and had made that admission to some extent. Mr. Grant came here a stranger in a strange land. He came here to do good for the benefit of the Colony as well as for the benefit of the Company which he represented. He came to superintend the construction of a railway from one end of the island to the other, with a capital, as far as money went, of £650,000. It would assist the arguments he would presently have to adduce in favour of the Main Line Railway Company if he called the attention of the jury to this circumstance. His learned friend had talked of the extension of capital that the Company should make—that they were bound in law to make. He, Mr. Miller, had said it would assist in argument, because he contended that they were not bound to advance a single farthing beyond the £650,000. It would assist in the true interpretation of the contract if they referred to the letter from Mr. George Sheward, the Chairman of the Company, and the reply of the Government to it. And he would at this stage say that as far as possible he would toss all documents to the winds. He was replying to the case in a manner calculated rather to place in a popular form before the jury the contentions that were sustained by his learned friend, Mr. Fooks, he having dealt with the legal incidents which it was no insult to the jury to say that they were incapable of understanding. In doing this he would not take the witnesses name by name, and date after date, but would endeavonr to make his task much shorter than it would be if he adopted that mode of procedure. The Company exchanged the contract in a letter stating to the Government—"You will be glad to hear that there is every probability of our raising £650,000 to be appropriated to the construction of the line." They would see the signification of these words. It was not to be an unlimited capital, nor one million or a-half million. His learned friend said that the Company were bound to find all capital. He agreed to that. It was utterly immaterial whether the railway was to cost £5,000,000 or £650,000—whatever it cost they were bound to find the money. If it cost £650,000 the Colony was to pay them interest on that; and if it cost less it was to pay interest upon that. But if it cost more the Colony made a splendid bargain: they were not to pay interest upon more than £650,000, the residue was to come out of the pockets of the Company; and they did find it; they expended between £1,000,000 and £1,200,000 upon the construction—of what? Was it a benefit to the Company? What was the result of it? The interest of 5 per cent. was practically only an interest of 2½ per cent. There was a magnificent profit—something for the Company to fatten upon—to feed upon the vitals of the Colony! Was it intended that there should be a large sum appropriated and devoted to the extension of this contract? Certainly not. Mr. Sheward tells you £650,000—"We are able to raise £650,000, and for this we will construct the line." And what did the Premier reply? He said, "He was glad to hear it." That was the first point to which he (Mr. Miller) would direct attention when they considered the true interpretation of the contract. That being so, what was Mr. Grant's position when he came out? He was told to go to Tasmania and construct during the four years a line for the benefit of the Colony and the Company. "There is your capital," he was told—"that is what you have to work upon for the purpose of constructing a line as constructed and equipped for working when it is opened. Then, in order to enable you to meet the expenditure necessary to maintain and work the line, you have the subsidy upon which you can rely, and which will never fail you. You have in the first place the revenue from the actual working of the line. For years and years to come that will necessarily be very small. No matter how profitable a concern the line may be in the future, in the first place there must be a very small traffic; but over and above that you have something that nobody can touch; you have something upon which you can as safely rely as if were sealed and delivered into your hands—you have £32,500 a year secured to you on the faith and honor and integrity of the people of Tasmania. That fund will always be in your hands, and with that and your revenue we send you with sufficient means to work the line. You are a stranger in a strange land, but you are not a beggar; you are not a bankrupt in that land." So Mr. Grant came to Tasmania, expecting that

when his quarterly abstracts were presented to the Treasurer, in accordance with the solemn obligation of the Colony, within 14 days he would receive a portion of each of the sums and interest. If that was so, let then conceive for a moment what was Mr. Grant's position when that sum which was beyond the possibility of failing him, did fail him. Let them try to understand what was his position when, after expending not only £650,000, but between £1,000,000 and £1,100,000 and afterwards another £100,000, and believing as he did that the whole expenditure should be met out of the actual receipts supplemented by the £32,500, he found that that was withheld upon some pretext or another—unjustifiably detained from him. He was made almost a bankrupt in a strange land. He did not say that the Ministry intended to break their obligation, but the contract was bald and vague; the framer did not intend to express such a meaning as that which had been arrived at by the Government, and upon which they had kept back a portion of the interest. He would ask them to consider Mr. Grant's position. If they were told that he was a diplomatist; that he had contrived to get out of the difficulty by bending to the blast; that he had avoided shipwreck by jettisoning a portion of the rights of the Company, he asked was it generous—was it right—to accuse him of being insincere or untruthful? Again, they found that another large sum was withheld—another improper detention. His learned friend had said that the Company, as honest men, the moment they found that they could not perform their obligations, should raise fresh capital, or, if their credit was not equal to it, they should "wind up" and allow their profit to be confiscated; and the Colony of Tasmania might have consented to the action, and bought the railway for a mere song. That was the real position in which his learned friend asserts Mr. Grant to have been in. He who was rendered bankrupt by no fault of his own, but, by the action of the Colony in withholding the money, should have wound up the concern. Suppose his learned friend's contention had resulted, upon whom would the shame and degradation have rested? Would not Mr. Grant, by his works of construction, have been ruined by his trust in the faith and integrity of the Colony? This was not high-fallutin—it was supported by facts. In 1878 an Act was passed to appropriate a sum not exceeding £56,482 5*s.* 10*d.* from the Consolidated Revenue Fund for the purpose of paying interest to the Tasmanian Main Line Railway Company, Limited. There it was, under the Ministers' own hand. They had no doubt more advances at interest. But he said, "Thank you for making us pay interest on our own money—money that has been wrongfully retained from a Company whose whole capital had been expended at the time." This was not bunkum, because the Government had by Act of Parliament acknowledged that a wrong had been done to the Company. It had been the fashion for years past to publish one side of the question, and honorable men had read themselves into the belief that the Company must be wrong and the Colony must be right. It had always been said so; they heard it at their morning prayers, they heard it at their meals, they heard it in the public streets, and read it in the newspapers,—and there was no one but Mr. Grant to reply. It was said that the Company were defrauding them, and they listened to it; it was important to their pockets and grateful to their feelings. But had it never occurred to them—had their attention never been called to the fact—that in every test that had been made between the Colony and the Company the Colony had been wrong and the Company had been right? Down to the second issue, it was true that in each instance the Company had received a lesser amount than they believed to be right. Why? Because Mr. Grant, whose sincerity was attacked, had not dared to run the risk of the outlay and the heavy expense to fight the Government through the Courts of this Colony, and afterwards through the Court of Appeal in England. The delay would have injured the bankrupt, even if the expense had been available. He had therefore, to save his vessel from shipwreck, to jettison a portion of his cargo. But in each instance the Legislature themselves had had to admit that a large sum was due by the Colony, and that the refusal to pay was an illegal detention. Mr. Grant had had to contend with these difficulties, and he had done it simply because he had had to take the compensation all through down to the present time. But after these successive fights, after these supplications had been framed, when the Colony had had to admit its indebtedness—after all these years of strife and heartburnings, what did the Government do? Why, they affected to have been anxious to pay the Company all that to which they were entitled, and while they have been so anxious they have acted, not as the Government of the Colony should have acted, but as hucksters, paying sixpence by sixpence to the amount of £900 before the trial, leaving the Company to get the rest. The Government had acted upon a mean, ungenerous, unnational interpretation of a public obligation. Well, that would bring him to the commencement of what his learned friend characterised as the inception of the undertaking, and it was upon this very point that they diverged. Therefore, the jury had had Dr. Madden's picture, and he would now give them his. But first, he would say that they must all recognise how desirable it was that in this cause should cease all strife between the Company and the Colony. It must be a matter of rejoicing to them, notwithstanding his chaff against his learned friend the Attorney-General, that the best counsel they could get should have an opportunity of putting the Colony's views before the Judge and Jury, for a harmonious working together of the Colony and the Government could only commence from the time that a judicial interpretation of the contract set at rest all occasion for future controversy and difficulty; it was only then that they could obtain the true national advantage from the construction and maintenance of this great artery of civilization and progress. It was their main artery; through it the life blood of civilization, commerce, and progress must flow; it was the high road through which and along which the thousands and thousands of visitors who came to seek health and recreation on the shores of their beautiful bay were carried. By it they gauged the advance

of Tasmania; by it they tested the rights of the Colony to a high rank with the other Colonies. These visitors were accustomed to luxurious railways fitted up with sleeping accommodation. They came from Colonies where they had seen splendid stations, and they came to Tasmania, and said, "This is little Tasmania!" They jibed and spoke derisively of the railways. Of course they all knew how travellers criticised railways, and derisive remarks were sure to be made of the Main Line. "Stinted accommodation, mean, starved," must necessarily be said, and they would see that the railway was unable to meet the national requirements. Until that time, which must arrive almost immediately, when Colony and Company would work harmoniously together to improve and extend that line, it would not meet the national requirements. That brought him again to what his learned friend called the inception of the undertaking. The Government Report, that had been based on evidence taken by the Royal Commission, had been tendered but objected to, but he was not going to quarrel with that. He would take it that prior to the first Act the people of Tasmania were laggards in the rise of civilization, but at last awakened to the necessity of getting national expenditure for advancing and maintaining the advantage of railway communication from one end of the island to the other; whatever it might be with the other portions of the Colony, they saw that this would be necessary, or they would have to shut up shop; that was felt at the time. What was the state of things at that time? They had a magnificent road, constructed by labour which they almost blushed to acknowledge. They had a main road of this description, and what was the traffic upon it between the two chief towns? A rumbling stage-coach day and night, which took thirteen or fourteen hours to do the journey. It was a state of things that was disgraceful to the Colony, and the result was that a deputation culminated in the railway commission. They made a report. And here he would call the attention of the jury to the fact that his learned friend treated the Company as if it were a speculative Company looking out for the dreamiest and simplest people they could find, that they might obtain improper advantages in the shape of profit, or in the shape of undue concession, and thus make a people pay an enormous amount for their railway. But that was not the fact. This Company was the aggregation of the contract; it was the aggregation of the Legislature. It had no existence, and Tasmania was to them an unknown country, commercially speaking. The most sanguine speculator in England would never have dreamt of investing his money without something more than a trust put into his pocket in this country. So the Colony had to make overtures to the stranger, and the terms suggested were embodied and alluded to in the contract. That was the basis. And how very moderate were the requirements of the people. The mere investment of the sum they proposed in the first Act to give in Debentures would have produced a perpetual income at 6 per cent. of £18,000 a year, and it did not matter what the profits of the Company were, there was to be no recouping. They were willing to give the sum of £300,000 out and out, or they would give £25,000 a year for 20 years. And what were they to get for that? The Company were to run one train each way per day, and that was to go at a minimum rate of speed of 12 miles an hour. The coach went 10 miles an hour; the Company would fulfil its obligations if the railway went 12 miles, and the learned Judge had described this projected railway as a sort of superior tramway. But did they find that any one took advantage of the offer. No; the Act remained a dead letter. They were willing for a 12-mile train to give for 20 years at the rate of 3 per cent. upon the cost of construction, and if his learned friend's interpretation of the contract were correct, the remuneration was precisely the same now; so that the men who advanced £650,000 upon a guarantee of 5 per cent. were fools for paying—it was over-payment. But it was not contemplated by the parties that the contract should be more profitable than set forth in the Act, and so it was rejected. The Colony had to amend its offer It was then administered by men of very huckstering tendencies; they paid a little more, and ultimately an Act was passed under which the railway was constructed. They would then see the position in which the Government were placed. They had no speculative Company seeking concessions from the Colony; but they had a Government confessing on behalf of the Colony that it was either unable or unwilling to find the money for the construction of its own line, and it had to go on its knees to get help in order that the people might obtain their just demand. In their negociations they were successful, and what was their position? The position, they would find, was so emphatically laid down in the contract that there would be very little doubt concerning it. They would all hold that the Company would be a considerable loser even under the first contract. Why was it that this contract was so cogent in its declaration of what the Company were to get? They had to raise money in order to construct the line and maintain and work it. As a mere contract for constructing and working the line they would get no speculative people to take it up; but when they put the contract into the same position as the ordinary run of investments of small savings—when they put the investors into the same position of security, and when they could look for some return, and the rate of interest so secured was greater than the ordinary rate of interest that they got by similar investments in the funds of Great Britain—then they were attracted, because it meant the difference between $2\frac{1}{2}$ and 3 per cent. at home in England and 5 per cent. here. To many of them it meant the difference between indigence and comfort, and therefore that was the inducement held out; but if they told these persons that the contract was so barbarously bald and vague that a construction should be put upon it out of which the whole of that interest might have been diverted, and instead of receiving 5 per cent. they would not receive 3 per cent., and, as in point of fact had been the case, that for many years they should not receive one penny of the money, how many of these investors would have embarked in the undertaking? He was anxious to show the jury that there were two sides to every question. It was a very graceful compliment

that had been paid them and the Colony by Mr. Fooks, when he told them that he had full confidence in their honour and integrity. Many suspicious persons might not have felt that confidence which was felt by his learned friend; they might have desired that the matter should have been proceeded with elsewhere; but, as far as the Company was concerned, their confidence was manifested within a short time by their proposal to submit the whole affair to arbitration in the Colony. One might pause and consider what would have been the consequence of dealing with the matter in a colony where there was only one Judge. If these small investors considered that they would not get that which they were entitled to in Tasmania, the jury would not have felt insulted; they were strangers to the investors, and would have said that they knew no better. The jury were all personally known to him, and amongst them were men with whom any man could trust his life, and, what was dearer still, his honour. He did not believe they were biassed in the case, even though they paid taxation. He had the courage to tell them, however, that he heartily wished that they had entered the box, if it were possible to do that, without having heard of the Main Line Railway Company, without having heard a word about this foreign company. They were all honourable men; he was not kissing the blarney stone, for it could not be a compliment to be told that they were men of honour and integrity; but he knew they were human, and had human passions, and they had been accustomed over their morning paper to read nothing but a one-sided account of the question, therefore it was likely that against their will unconsciously they had entered the box with preconceptions; and they all knew how difficult it was for men to get rid of existing predilections. They would, however, do their best to arrive at a just decision; but the question was, would that decision be of the same value as if it were given by men who had never heard, and could not by any possibility have formed any previous idea of, the merits of the trouble between the Government and the Company? He had said that the jury were parties to the contract, because the supplication was defended in the name of Her Majesty the Queen, who had nothing to do with it. The contract was signed by men who had nothing to do with it; it was entered into by the Ministry of the day; they had nothing to do with it. They were the mere accident of the political hour—a bubble created by political breath in one moment, and vanishing into air in another; they were men who might prolong their ephemeral existence by making a stalking horse between the interests of a foreign Company, and the interests of the Colony, and by bravely, sternly, defending the interests of the colonial taxpayer against foreign grasp. The taxpayers of the Colony were the persons on whom the obligations rested to fulfil. The contract remained. Ministers came and went out—the contract must be fulfilled. By whom? The taxpayers of the Colony. He spoke to them as arbiters, and had endeavoured to give them an honest, fair warning to try, if they had any preconceptions, to remove them from their minds, to forget them completely. Day after day the newspapers had been ringing with the case, but they were one-sided publications, which gave the Government side of the question, and only that. He would ask them to forget all that. He knew that they would endeavour to do so, and he had no doubt that to a very considerable extent they would be successful, and would consider the case fairly and impartially. He would now see what was the intention of the contract on the part of the Colony. They would not put their hands in their pockets beyond a certain amount. They said, "If our revenue is not sufficient to meet our expenditure we shall have to do an ungrateful thing—we shall have to impose fresh taxation; we must know exactly what we stand to lose—that is paramount on our side; we must know exactly what we have to pay." £25,000 a year was the limit. Did the jury think that in drawing up that carefully constructed clause for the recouperation of the Company that they cared whether the Company would ever receive £1000 or £4000 back in the shape of recouperation? No. The paramount benefit, they considered, was the construction of the railway; that was the grand idea, and they never could have dreamt of little petty savings to be gained through participation in profits. The grand benefit was the railway, which was to be constructed as well as possible for the money, and maintained so as to give the greatest amount of profit, to present the greatest appearance of respectability, and to give to the Colony contingently and prospectively as it advanced greater and greater benefits. Could any one think, that being the paramount object of the framers of the contract, that it was their intention to narrow it down so as to escape the payment for the miserable little articles which formed the subject of the suit on the ground that, being items of construction, they should come out of capital? Could it be supposed that the people would have entertained these ideas for one moment? No. They would have said "Sweep away such pettiness, and give us our railway. If it should advance, if there should be extension of works, then let the expenditure come out of our joint fund." His learned friend had said the Government and Company were partners. Well, it was a very unequal sort of partnership if the Government's construction of the contract were a correct one. His learned friend would take all the profits to himself. All the expenditure for the extension of the line was, they said, according to the contract, to come out of capital, and not a concession would they make. It was not enough that they would not pay interest, but they would not make a single concession, not even a trifle for putting up a porch to keep off the rain. But if they allowed the Company to construct the line with the proper facilities they would get it all back. They allowed it was the river into which all the watercourses of commerce found their way before they were finally launched into the sea of intercolonial commerce, and the greater the advantages given the sooner would the line become a paying concern, and the sooner there would be a surplus profit, out of which the Colony could be recouped the whole amount of the construction. They would get it all back if the contract were only interpreted liberally. He did not ask the jury to interpret the contract illegally, but they would see what enormous advantages the Colony would obtain from the railway

if the contract were interpreted liberally. In dealing with the obligations of the Company his learned friend seemed to slide over the question, and he scarcely knew if he said the Company were bound to make the items in dispute items of construction—whether he contended that it was entirely a generous, liberal, voluntary act on the part of the Company in one sense, or an ungenerous scheme to increase the outlay. Did Dr. Madden mean that the contract as it existed provided that the Company should spend £650,000, and if they should go on increasing that expenditure as time went on they would not receive one penny interest upon that—that they should go on spending capital, and get no benefit whatever? But if it were a voluntary act—and they admitted that it was—he said this that if they chose to make a work for the benefit of the Colony they could not help asking the Colony to assist in paying for it—to make a generous contribution towards improving the railway that was such a great benefit to the Colony. He was afraid it would require a much more generous Legislature than the present one to do this. But if the Company were bound to do this out of capital there must be in the contract some mode of apportioning by the Company of the expenditure. He contended that the evidence on this point was all leather and prunella; in point of fact, there was nothing for the jury to consider; there was nothing in dispute if his construction of the contract and that of his learned friend was to be borne out, because it all came within the four corners of the contract, and all the Acts of Parliament that were associated with it from the first Railway Act to the Disputes Settlement Act. Remarks had been made about the value of the testimony that was adduced before the Commission, and he quite agreed with these observations. Substantially the evidence was valueless. And why? Because it was addressed to the construction of the contract, and that was a matter for the lawyer and the learned Judge to deal with, and no matter for the consideration of the experts who gave evidence. The same observations applied in the present case. It was not for them to consider upon the value of experts' evidence as to this question. They had nothing to do with that. They had to consider the special interpretation of the contract. It was admitted on all hands that it was entirely bald, and, whether it was rendered purposely bald and vague or not, it was a contract the like of which in its obligations had never existed in the known world. It was the work of 'prentice hands; it was the work of men who did not know anything of the use of technical terms, but who desired to use unambiguous English and plain language, and they did so. If it was upon that, and that alone, the question was to be decided, then it was for the learned Judge to say what was the construction to be put upon it. If he did so according to general principles, then the language used would bear its proper technical meaning, and they would then have to consider as to the universal practice of railways—what was the best usage prevalent—as to what was intended to be meant by the terms maintenance and working, and, that known, what fund they should be charged to—revenue or capital? But they were not proceeding upon such a contract; they were proceeding upon a contract in which, it was true, the words maintenance and working did occur; but they were used in conjunction with other language by which using them in their ordinary sense they were to be limited, and with which they must be combined in the interpretation of the contract. It would not occupy a minute if he read an extract in illustration of this from "Leake's Digest of the Law of Contracts":—"In following this rule words in general are to be understood in their plain ordinary and popular sense; but technical words used in technical subjects are to be understood in their technical, which is, then, their primary meaning; and mercantile terms used in mercantile contracts are to be understood in their ordinary mercantile meaning. Thus it is laid down as the rule of construction 'that words are to be construed according to their strict and primary acceptation, unless from the context of the instrument they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect; and subject always to this observation, that the meaning of a particular word may be shown by parol evidence to be different in some particular place, trade, or business from its proper and ordinary acceptation." The governing principle must, of course, be to ascertain the meaning of the parties, and this principle was one of universal application. "The following examples (Leake went on to say) may be cited of the application of this rule. A contract to pay a commission on the net proceeds of a cargo after deducting certain specified charges was construed literally to mean the actual proceeds, after deducting bad debts, and all charges, besides the specified charges. A contract for the sale of all the goods to be manufactured at certain works during a term of years, subject to termination by the insolvency of the buyer, was construed according to the ordinary meaning of insolvency, that is, an inability, in fact, to pay; and not according to the technical meaning of insolvency under the Insolvent Act. And the same construction was put upon the word in an agreement not to enter up judgment on a warrant of attorney unless the debtor should become 'insolvent.'" That seemed pretty close, no doubt they would say. A man absolutely entered into a contract which was to terminate if he became insolvent. What did that mean? It meant that he was forced to take the benefit of the Insolvent Act. It was plain, unambiguous language—inability to pay debts. He thought this would illustrate what he had said concerning the clause of the contract upon which he had touched. He had already said that the overruling intention, as far as the Colony was concerned, was to obtain the benefit of railway communication, and to obtain as much profit from the working as possible. Clause 1 of the contract was, "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 hereof, which construction, maintenance, and working are included in the expression 'the said undertaking' herein used."

The obligation was that the railway must be maintained and worked as well as constructed. The mere making of the railway was not completed for a period of four years, during which interest had to be paid, and then subsequently it had to be maintained and worked. The whole of the clauses of the contract and the Acts had to be read together. The object was, not that the railway was to be merely constructed, the object was that, when constructed, it should be maintained and worked. Had the language used stopped at construction, there might have been something in the contention of his learned friend, but the only words used were "construct, maintain, and work"; there was nothing to limit them, and they must be used in the same sense as in any other ordinary contract. The Company was under obligation to do all that was necessary, not only to construct the railway, but to maintain and work it. He thought if they would turn to Clause 5 they would see that it set out, in plain and unambiguous language, what was the paramount intention of the contract, so far as the obligations of the parties thereto were concerned. This contract was evidently drafted by 'prentice hands, by men without experience of railways, and therefore they had been careful to render their language as unambiguous as possible. "The Governor hereby especially guarantees" (not "guarantees, but "especially guarantees") "to the Company interest at the rate of £5 per cent. per annum upon the moneys actually expended in and for the purposes of the construction of the said Main Line 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." That was the special guarantee; they were bound to the construction and maintenance of the line for traffic. If they failed they did not get the guarantee. They had not failed; yet, under the contention of his learned friend, the Company would not get five per cent., nor three per cent., nor two per cent. He did not put it that the Government claimed not to pay it, but that it was to come out of profits; if that were so the object of the contract failed, and the Company could not get their guarantee. They were not specialists, but mere laymen, and their sole duty was to consider the special provisions of this contract, taking the words in their ordinary interpretation, and if these were set aside the Company would lose their guarantee, and might not get it for years to come. Let them read the words he had quoted coupled with those of the 14th Clause—

"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."

Could any language be more emphatic than that? The intention clearly was that these parties who were investing their capital in the construction of a railway which was to benefit this country should be secured in a guarantee of five per cent. interest at least, and more if they could get it. Language could not be more emphatic by reiteration than it was in these clauses of the contract. The jury knew if the contention of the other side were carried out that they could not receive that interest. True it was that in many years to come the line might become immensely profitable, consequent upon the increase of population and traffic, and they might get splendid profits, but it might not be during the thirty years or during their lives, and of course they would say they contracted for their own benefit and not for the benefit of their successors. Under the contract they were bound to receive the amount of the guaranteed interest, which the Government now attempted improperly to stop. Government claimed that the contract entitled them to a share in the profits—and how were these profits to be ascertained as far as the contract was concerned? It was in the 8th clause that the expression was first made use of, and they would find there what it meant, according to his contention. Of course it was for His Honor to tell them what the interpretation of the bargain was, and he thought he would say simply this—that the balance of receipts after deducting all expenditure—that constituted the profits. The ordinary meaning of the expression was held to be, that the amount of the difference between expenditure and receipts which would be available for distribution as a dividend amongst those concerned after the deduction of all items of expenditure—that constituted the profits. How were they to ascertain these? How were the profits to be calculated? The Governor was to guarantee interest during four years of construction and for thirty years afterwards; they would not be likely to find early profits. During the four years of construction there would be very little profit, and whatever it was the Company had the benefit of that. But after the line was completed for working; when the capital was all expended and when they were ready for business; when they could take down their shutters and open the shop ready for trade, and customers began to come in, they ought then to pocket some of the receipts in the shape of profits. The receipts were to be ascertained, the ordinary expenditure to be deducted, and the balance would represent the profit. He did not see that any of these items could fairly be objected to. If any of them could be deducted for one class of expenditure, he failed to see why there should be any exception.

Dr. Madden pointed out that the Act of Parliament said what should be considered reasonable expenditure. It was only maintenance and working that could be taken as expenditure.

MR. MILLER admitted that it was only the proper charges for maintenance and working that could be deducted, but they would not find a definition of these anywhere in the contract; but they would find this in Clause 8—"after the entire line is opened for traffic the Company shall furnish to the Governor at the close of each quarter an abstract of their receipts and expenditure for the preceding quarter." They had received these abstracts, which showed the gross amount of the receipts under each head, and the gross amount of the expenditure. That was all that was wanted by both parties to the contract, and these abstracts had been made out and furnished since the commencement of the railway. These abstracts had been received and passed without cavil or remark, until the Colonial Auditor had questioned these items of expenditure. The abstracts were all that the Company had to furnish, and they had furnished them. And this brought him to the question of profits. What were they to be? The abstracts "so far as they could be made up in the Colony" were to show "the receipts and expenditure for the preceding quarter, and the Governor shall be bound to pay to the Company in Hobart quarterly, within fourteen days next after the delivery of each of such abstracts, such amount of money as will with the profits (if any) of the preceding quarter make up interest at the rate of five per cent. per annum on £650,000 (or such less sum as the railway and works may cost), and so on from quarter to quarter." What did that contemplate in ordinary language? Did it contemplate that the word "profits" was to have any other meaning than that shown by the figures in these abstracts—the excess of the gross receipts over the total of the gross expenditure. Under no interpretation of the term could expenditure be said to be profits. It was a very peculiar position his learned friend had taken up. However, it was for the interpretation of his Honor. According to the contract, on the presentation of these abstracts of receipts and expenditure the Governor was bound to pay the interest. The Government had only to see that they had proper vouchers for the expenditure. It was no contract obligation on the Company to separate the classes of expenditure. It was the total receipts and the total expenditure apparently which they had to return. He granted that in the construction of the language there might be some limitation, but what did it amount to? Unfortunately, in addressing the jury one had to address the Judge, through them, on what were really technical matters.

HIS HONOR: I wondered whether you would take notice of the limitation.

MR. MILLER: Oh, yes; my shot is aimed at your Honor, although it is through them.

HIS HONOR: I am taking it all in.

MR. MILLER had been trying to arrive at the true definition of the word profits, but his learned friend, Mr. Ritchie, whose industry and research were well known, had formulated the terms in which it might really be put. He would read it to them. He was sorry to weary the jury, but in an important issue of this kind everything was of unusual importance.

HIS HONOR thought the amending Act, 46 Vict. No. 43 pretty clearly pointed out what the profits were.

MR. MILLER: That is the yearly balances.

HIS HONOR: That Act tells you that the revenue and expenditure in respect of maintenance and working is to be adjusted on the principle of yearly balances, and if such balance shows a profit on the working of the railway for the year, that is the profit. The profits of the undertaking must be so.

MR. MILLER read Mr. Ritchie's definition, as follows:—

The Act, 34 Vict. No. 13, and the contract, guarantee 5 per cent. interest on £32,500 a year to the plaintiffs. And the Act, Section 1, *secures* the receipt of this interest to the plaintiffs by means of *the manner of payment.*

The intention of Government, as expressly set out in article 14 of contract, is that plaintiffs *shall receive the full interest.*

The manner of payment as set forth in Act and contract is *part by means of profits on whole undertaking* (to be retained by plaintiffs, and *deducted by Government* as *cash paid in reduction of interest),* and the residue or balance of interest *paid by Government in cash.*

Thus, by this *manner of payment,* the *first* thing to be done is to *strike and ascertain* the amount *of the profits.* And this involves the manner in which they *are to be ascertained in accordance with the provisions of this Act and contract: and this is really the contention in this suit.*

The plaintiffs' contention is that the only method *(the manner of payment being* as it is part *by profits)* by which the receipt by plaintiffs of *the whole interest* £32,500 can be *secured* is *by deducting* the *gross expenditure* made by them *from the gross receipts or revenue*; the balance being the *net profits* of the whole undertaking *and the profits* mentioned and referred to in *both Act and contract.*

By this means of adjustment the plaintiffs *would retain,* out of revenue in their hands, *all sums expended by them* as *verified by the Auditor* in the quarterly accounts; and would further, by retaining these *net profits,* on receipt of the *balance of interest in cash, receive clear the full* £32,500 as secured to them by *the Act* and *intended to be received by them by the contract.*

The defendants' contention is that in striking profits *the gross expenditure* admittedly made by plaintiff *is not to be deducted* from revenue, but *only so much of it* as is *rightly chargeable to revenue, &c.*

If this principle in adjusting the yearly accounts is carried out, the balance of profit will be increased by the amount of deduction thus made from the expenditure *already paid by plaintiffs,* and the balance of interest payable in cash to plaintiffs reduced *in like manner*; so that, in fact, *plaintiffs will not receive the full sum of* £32,500 *a year* secured to them by the Act and contract.

The *manner of striking and ascertaining the profits* in this case is a part of "the manner of payment by *profits,*" and inasmuch as *this manner of ascertaining the profits does not secure* the *receipt of the full interest* to plaintiffs, *it is not the manner of payment the Act provides for,* and cannot be allowed.

The mode of adjustment contended for by plaintiffs not only gives full effect to the provisions of the Act

and the intention of the contract, but it gives effect to the express wording of the 8th article of the contract and Section 5, Act 46 Vict. No. 43, and *has been accepted and acted on* by the parties themselves in all the former adjustments of their accounts down to the final settlement, 30th September, 1882.

The *first time* these objections were taken was by *Mr. Douglas, in* 1884.

Any construction of the contract which shall be *repugnant* to the *express provisions* of the *Enabling Acts* would be *ultra vires*, and cannot be permitted.

The Act and contract are to be read together, Article 10 of contract, and if any divergence, the Act, not the contract, must prevail.

Under the 8th section of the contract they contended that the abstracts of receipts and expenditure having been rendered, the Government was bound to pay the guaranteed interest within the period of fourteen days. He again quoted the section. His learned friend had pointed out that under the Act, 34 Vict. No. 13, a definition was given under the third sub-section of section 3, "That when in any year the profits of the said Railway 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 £6 per centum, and so on in any succeeding year until all moneys which have been paid by the Governor in Council under the guarantee hereinbefore mentioned shall have been paid;" and that after that time the profits shall belong to the Company. The contract limited the reading, and was to be taken first, and the definition therein given declared that profit was to be the profit arising from working the railway. We have already said that this is the definition of the contract, and that it means the profit of the undertaking. Another thing had to be done under the 8th clause. The abstracts of accounts were to be presented, and within fourteen days the Governor was to pay the interest on receiving this abstract of receipts and expenditure; but he had to be satisfied that the whole amount included had been expended. They were not merely to say in their abstract we have expended so much on this viaduct, or that bridge, or anything else. Section 10 cleared this up by providing that 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. No voucher was required to show the propriety of the expenditure, but simply a voucher that the expenditure had been made. That was a limitation of the powers of the Governor to interfere with the expenditure of the railway; that was a matter entirely in the hands of the manager for the Company. His learned friend had said that there might be excessive, wanton, or lavish expenditure, but that would not be recognised in any undertaking where there was a discretion to expend money. There was a remedy against that, for the Court would never allow it, but would put its foot down upon it at once. Where there is a discretionary power to expend under such a contract, the Court in its equity jurisdiction takes cognizance of it, and there must be no improvident expenditure. In illustration, the case of two partners was given, but in the case imagined the sleeping partner would simply go to the Court to have accounts stated, and he could say the accounts were not reasonable, and they would be adjusted. In all these matters a remedy was given by the law, so there was no ground for such a contention—it was a mere *ad captandum* argument. There it was said that the partners had a joint interest, and that their powers might be abused; but that did not follow. In this case if they made an expenditure, even if it was an improper expenditure, they would be entitled to what they were seeking. As to adjustment, there had never been any adjustment, so far as the facts went. That meant an adjustment by two persons acting for themselves or by an accredited tribunal. There was no provision for this in the Acts, and in the exercise of their rights under the contract they had dictated the amount of the profits which they were entitled to give. There never had been any adjustment of accounts: however, that was a question for His Honor. There had never been any adjustment, but the Company had done all they were bound to do. The Government, on their own responsibility, took certain items out of the accounts and then coolly said it was an adjustment. You ask a man to pay you a sum which he owes you; he coolly says I wont, strikes out a number off the items and calls it an adjustment. That would be a curious way of adjusting accounts, would it not? There had been no adjustment of these accounts—it was contrary to fact. There had been nothing in the shape of an actual or legal adjustment of these accounts whatever. Let them come now to what was all important. He had been called on somewhat late in the afternoon, and might be feeble in putting the case before them, but the learned Judge had full notes of the arguments raised by the leaders, and if he (Mr. Miller) put the case imperfectly it would be for His Honor to deal with it. He would come now to the 6th section of the contract, and should present it, coupled with the 16th. They were the keystones of the obligations imposed upon the Company. In the first place the Company was to construct, maintain, and work the railway; and there was no contention that what was required in this respect had not been done. They were bound to equip the line with rolling stock, and to do all that was necessary to enable them to take down their shutters and commence business; and in view of what had passed they must now take it that there had been nothing improper before the solemn release which had been executed between the parties in 1882. Clause 6 said "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." But did it stop there? All the experts examined had given their evidence as if the section stopped there; but it did not stop there: the railway was to be worked "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." The item of construction was complete, and everything had been done that the nature of the traffic required, and interest had been paid during construction; all that had been done, but the obligation did not stop

there. During what period was the agreement to last? Not during construction, but during the whole thirty years, or, in fact, in perpetuity. During all that time if extra station accommodation was required the Company must put it; if new sidings were required, the Company must pay for them; and if new rolling stock was required, the Company must supply it. The only question was, how were they to be paid? Clause 16 said—"The Company shall be bound at all times from and after the completion 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." Could any sensible man doubt that this was a permanent obligation upon the Company to provide for all time every accommodation necessary for this railway; and that accommodation had been provided in excess of what was required. What was represented in the certificate of the Auditor was a complete fulfilment of the Company's obligations before the line was opened. He would take the case of two partners, and he might quote the old saying *facias ad hosti docere*. Two partners enter into an agreement to build a brewery; they would lay their heads together and say, "We shall make so much beer, and we shall want a certain amount of accommodation." One says to the other, "You shall find the capital for it, and I will allow you interest on it up to a certain amount." That is not the real intention. It is not simply an intention to build a brewery, and then remain in a stationary condition. As time goes on they would want more accommodation, and would have to increase their plant and buildings. What would do when they were brewing a certain number of hogsheads would not do for double the number; they would want more buildings. What would the jury think under such a contract as that if the active partner said to the other, "Now, you are the original man; you built the one brewery, now you shall find the capital to build all these new works. You created the original buildings; it is your interest to increase them, and you will gladly do it for your own benefit. You admit that these works are all necessary and proper, and must be done. Now you pay for it, and I will receive half the profits to be derived from all these additional works." Was that an agreement that any Court could uphold? The Court would see what would be the effect. There could be no doubt, as far as this work was concerned, that the original £650,000 would have amounted to another £650,000. Interest on that additional sum would have to be paid, or the Company would become bankrupt. How could it be said under such conditions that the Government had especially guaranteed or paid 6 per cent. on the first capital expended in construction? Such an interpretation of the contract would be monstrous, and if it could even be contended that such a provision had in any way crept in, it would be contrary to the first principles of natural justice. He did not say they would be able to go to a Court of Equity and ask to have the contract reformed, but such a state of things would go a long way towards getting it reformed. Well, as he had said, the Company were not only to construct this line of railway, but were to maintain and work it so as to afford every facility for passenger and goods traffic over every portion of the line. That provision was to be subject to wholesome restraint. They had the power of incurring any expenditure, but the powers of the Supreme Court would restrain them, as that Court would have to decide as to the propriety of that expenditure. It was said they could go to any extravagant expenditure, duplicate the line if they liked, or make a double railway. They could do nothing of the kind. It was said they might gild the interior of the tunnel—which might not be a bad thing, as it would lighten their darkness—but such an argument was the *reductio ad absurdum*. The Court would prevent any such expenditure if they attempted it. He believed it was admitted, so far, that the expenditure incurred had been necessary, and in accordance with the terms of the contract. It was contended that expenditure was entirely in the hands of the Company, and it was asked who was to say whether it was extravagant? There was nothing in that—in fact, it was not so, for if they incurred extravagant expenditure the Court would be appealed to and they would be dealt with. Such an argument was simply nonsense, for it would not be to the interest of the Company to do so: to get profits was their great object. Again, it was practically nonsense when read by the light of what were the actual works at present existing. What had been done and what was objected to? A verandah had been constructed over the main front of the Hobart station to keep off the rain, and to keep cabs from pushing up against people; they saw the need of that. At the end of 30 years did they think that verandah would add a penny to the value of the line? Did they think, to any person purchasing the undertaking, that any sane purchaser would be moved to the extent of a farthing by the fact that there was a verandah? In the meantime who got the benefit? Timid women would not go to the station without such a protection, and if the traffic be enhanced by the existence of this verandah, why the country got the benefit of it. The sooner they had works of that kind the sooner would they get profits from the undertaking. Take the rolling stock: was it not for the benefit of the country that it be in good condition? If they had one or more extra trucks beyond what they had at the first construction of the line, did they think this would have the slightest effect on a purchaser? These were not permanent works. Look at the gatekeepers' huts. What would they give for the fee simple of these huts 30 years hence? The Company claimed, in respect of these, 15 or 17 cottages at a gross expenditure of £700, so they could easily calculate what the average cost of each had been. There had been an actual reduction in cost, and an actual lessening of danger, through thus getting respectable married people to keep these gates. In addition to that the Company were receiving rentals of 3*s*. and 4*s*. per week for the huts, which amounted to about 15 or 16 per cent. on the cost, so that they would pay for themselves in five or six years. The huts would be on the line in the future, and after five or six years would be returning the glorious interest of 15 per cent. on an undertaking on which the whole expenses had already been paid. The Colony accepted the benefit on the one side, but they did not hear the Colonial Auditor

say, "take it out of both sides of the account": what he said was, "we object to the side that debits the country, but we expect to receive the benefit on the other side." Common equity would tell them that if struck out at all it should be on both sides of the account. But the Company said they were bound to construct them, and as they were bound to give the Government credit for the profit, they must also debit the Government with the expenditure. In the case of partners to a joint concern, if any limitation of expenditure was intended it would occur in the contract; but in this case, from first to last, there was not one word of prohibition.

His Honor: You must first satisfy me that they are partners.

Mr. Miller: They are in one sense of the word; there is a trust and joint interest; but in the instrument that creates the trust there is not the slightest prohibition.

His Honor: When we begin to talk about partnerships and trusts in a case like this, we are only creating a difficulty, and going outside the question at issue.

Mr. Miller (continuing)—He would now take the whole of the rolling stock. Would it not be an utterly unreasonable interpretation of the contract that the Company should be bound for the working of this concern to provide fresh working plant which had to go to the joint benefit, while all the expense was charged to the Company. They were told that when they commenced to work this line the proper number of engines was 14, and that they were sufficient. The traffic had now increased from sixteen thousand to seventy-five thousand, therefore an increase of the traffic. Could that increased traffic have been carried on with the same rolling stock as 16,000. Just fancy what must be the excess of receipts over expenditure to produce that result! They said it was not within the contract, but if they contend the Company were not bound by the contract to do what they had done, and that this was voluntary on their part, and therefore the Company were not entitled to this monetary payment, what would be the position of the Government? The Company would be starved. Instead of providing for expansion of traffic the Company would have power to limit the expenditure down to the old lines. His learned friend had said it would be necessary for the Government at some time to purchase the line, but this would hurry the time. It would not be giving the Company an opportunity of developing the line as a national work, but it would be absolutely forced to keep in its original condition because the fight would be so unequal. His learned friend had said all the Company were bound to do was to keep those works in existence which were in existence at the time the line was finished; but if this were done who would be the sufferer? It would be the enforcement of the Government to purchase the line to put a stop to such an intolerable state of things. There was no limitation of payments in the contract. The contract, in clause 10, provided that "The Company shall provide satisfactory vouchers or other evidence of all payments made by them when required to do so by the Governor or whom he may appoint." If they were not bound to construct these huts, and produce these vouchers for rolling stock, why in the name of goodness should they be called on to supply these vouchers. The words were nonsense unless taken in their natural sense, that the Company were bound to produce vouchers for all payments because they were to receive credit for all payments expended in accordance with clause 6, in maintaining and working the line in an efficient manner so as to afford all sufficient accommodation and due facilities for the passenger and goods traffic of every portion of the line. If there was a limit to the expenditure, why was there no limit to the vouchers? In common sense language this is what it came to—"Under this contract you are to work the line; we will not give you a particle for the working of that line; you must look to the profits of that line—the revenue—you must look to that and to that alone. If it fails you must still be responsible for the expenditure—you must perform your obligations; and here came in that stringent clause 5 of 34 Vict. No. 13—"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 were 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." The working of the line has been most perfectly protected by the Legislature. It says if there is revenue you must take it out of the revenue, and if not you must still work it. We will pay you the interest, but that is all you will get from us. You did it in earlier years, you really paid it out of your interest, you had no other course for it. If you have not a farthing, or if you have spent all your money, still under the stringent provisions of section 5 the Supreme Court can be invoked to compel you to do it; more than that, the Supreme Court might, under clause 6, rescind the Government obligations; the Government could buy at any figure they liked. One could surely see how an argument of this kind could be expanded infinitely, but as His Honor had to put his construction of the contract before the jury, and had had the benefit of his learned friend's (Mr. Fooks) learned dissertation thereon, he would not dwell longer on the point now. His Honor, in one sense, unfortunately stood alone, and had not the advantage of the aid of the other Judges, which added to the responsibility he knew His Honor must feel. He trusted His Honor's construction of the contract would be in accordance with the Company's, but it might be that they might have to take the case to the Full Court, but if an appeal were necessary he was quite sure its

cause would not in any way reflect anything but credit on the administration of justice in this Colony. He said frankly that if he had any regret in his advocacy of the Company's cause it was that his learned friend on the opposite side (Dr. Madden) had not had a foeman more worthy of his steel. He had felt from the very first that there was no valid ground for contending that the contract was not plain and unambiguous in its terms, and therefore there was no reason why the jury should be called upon to go outside that contract; therefore he attached very little value to this testimony. If they could have obtained what the rules of law would not allow them—the whole of the engineers as a jury of experts, and, after they had given their interpretation, the learned Judge had summed up the facts—it would have been a desirable state of things; but unfortunately many things that were desirable did not exist, and this was one of them. The experience of witnesses on Government lines or on Company lines in England offered very little assistance, and therefore it was very little worth his while to comment upon it. If, as the learned Judge had said, there was some evidence upon which the jury might decide upon the question of capital or revenue, then he would venture to ask them to consider the different items, and to call attention to the fact that there was no distinction to be drawn between one item of expenditure and another. The contract did not do so, and therefore the expenditure was either proper or improper. Let them now consider why it was that the Government sought to draw this distinction—why they allowed some items and did not allow others? It was very difficult to understand this. In acting upon the principle that they would pay for works previously in existence, but not new works entirely, they said—"We will pay for the cottages that were in existence a year ago, but as for the others they do not take the place of mi-mis or tents, and we will not pay for them." Was it not an absurdity that they conceded that the Company were to be paid for those lodges which were entirely new, built in substitution of temporary accommodation, and to exclude those built at the very same time for the very same purpose, simply because there did not happen to be a tent or a mi-mi there? Now he would come to the rolling stock. What were the facts. The Company started with 14 engines. At the present time there were only 14, but during an interval of some years there were 16. These were all absolutely necessary for the working of the concern, though two represented what was absolutely of no use at that moment, and very little afterwards. They represented dying material—not actually dead material—but dying material. The jury had heard that it was the custom in Victoria to use the dying engine and its successor side by side. It was admitted that every one of these engines was absolutely necessary—that they would have had to shut up shop unless they had the number. They admitted also that they could not do without a new siding, and they allowed that to be charged to revenue, although it was a work that did not exist before; a year previously it was non-existent. He alluded to the Jericho siding, which they allowed, but not until they came into Court, when they were afraid of paying costs if they did not allow it. The Government had called the able assistance of his learned friend (Dr. Madden) from Victoria, and after taking the fullest time to consider their attitude, allowed it at the last moment. It was difficult to conjecture where their principle was. They said new works were to be charged to capital only, and here was a new engine and a new siding both rendered necessary; the very words "new siding" would tell them of expansion of traffic, and what was the difference between the one and the other? Therefore there was an admission upon the record that if the new rolling stock was absolutely necessary for the expansion of traffic, it should be charged to revenue; and if the Government were consistent they would admit this. His learned friend gave an illustration as to what a renewal was, and his illustration was a family one. He said "if a man got married and built a house for his accommodation at the time of his marriage, and subsequently his nursery becoming full, the house was unequal to accommodate all—unable to meet the requirements of the continuous 'construction' going on—suppose, he said, the man pulled down one room after another until he at last pulled down the house:—

Dr. Madden: I only said "nursery," you are stretching it.

Mr. Miller: But this is rendered necessary by the works of construction. His learned friend asked if that would be renewal? No doubt of it. It was a state of things that was very properly contemplated by the parties at the original time. Supposing that man's father-in-law said to him, "if you build a house I shall advance you sufficient to commence business," where was he to get that money? Why, out of the annual profits of his business. Could he calculate his profits until he had provided for that? Taking the ordinary run of men, would it not be charged against revenue?

Dr. Madden: All capital has been revenue at some time.

Mr. Miller: No doubt of it. But the expenditure of the year is fairly chargeable to revenue. Before you could commence saving there must be expenditure, and the expenditure must come out of revenue. His learned friend had endeavoured to prove that the balance sheet of the Company showed that there was an unexpended capital of £45,000, which might have been available for the works. But what he (Mr. Miller) said was this: if the Company had £45,000,000, it had nothing to do with the Colony. This obligation was to construct and work the line, and to find the means of doing it. There is no obligation over and beyond that. They were not obliged to have a large reserve fund to meet future contingencies—nothing of the kind; and assuming his learned friend's contention was right, it was a mere *ad captandum* argument. Looking at the balance sheet, what did they find? What they wanted to know was, was there a fund of so many pounds, shillings, and pence to be appropriated to these particular works? They knew the Company did not possess this fund. They have been on their knees to the Colony in order to obtain their rights, and if they

had £45,000 in their pockets would they have had to do that? But they had to seek the assistance of the Legislature. No chemistry of figures could transmute mere nominal capital on paper into pounds, shillings, and pence; it was a mere abstraction; it was a sum accounted for to the last penny, and if the details were examined the items of expenditure would show that the whole of that sum had been rendered in some shape or form, not improperly or fraudulently, but in a manner that could be brought before the light of day and before discontented shareholders—for there were discontented shareholders, who complained at there being no dividends. No one could suppose that the expenditure had been improper or fraudulent. His learned friend had therefore found a "mare's nest." In fact there was no such sum as £45,000 available—not even one penny-piece. He would turn to another thing. He had said already that his learned friend had made an unfair use of this point. He was sure that he did not intend to do it, and he felt satisfied that in the interest of justice the learned Judge would clear away obscurities. Mr. Grant had told them that there were certain large items of expenditure which had been charged to the construction account before 1881. These, however, the Company were bound to meet. He did not care when the accounts were adjusted or where, these items must make their appearance in the balance sheets; and they did make their appearance. But did they suppose that in point of fact when these large sums of money were expended in new works of construction, they would not have been only too glad to have obtained the money? Did they think the Company would have said "we make you a present of it." The common sense of the jury would tell them that there must be a meaning behind it. Mr. Lovett did not see it; but Mr. Lovett was not a good business man; he was Colonial Auditor, but that was very different from being a good business man. They would see that as a fact the expenditure was simply carrying on a portion of the works of construction and charging them to capital that had to be made, and had to be charged to capital as a portion of the original construction and completion of the line. He would pass from that to the evidence of the experts. These witnesses were questioned as to what their own experience was; and the question was tested in a very imperfect manner with such material as they had. If they thought it worth while to test Mr. Smith's evidence they would find that he was not altogether correct, though he did not say this to abuse his ability. Well, these gentlemen were tested as to whether there was a largely prevalent usage on the London and North-Western Railway and the Great Western Railway. The answer given was that new rolling stock was charged to revenue account, but it was so charged either because they were renewals or because there was an application going to be made or had been made to the shareholders to allow the abstraction of part of the revenue account to meet that which would otherwise be borne by capital.

DR. MADDEN: No; they had to apply to the shareholders to pay out of capital.

MR. MILLER: That means the same thing. I say they are charged to revenue in the accounts.

DR. MADDEN: Only the replacements.

MR. MILLER: My learned friend has shifted his ground; but they are charged absolutely to revenue, and in one instance to net revenue.

HIS HONOR: I understood that in one report, where they were not renewals, they were charged to capital account?

MR. MILLER: You will find that in one instance there was no vote asked for with reference to that particular stock, and in another instance it occurs with reference to maintenance and new carriages.

MR. RITCHIE: I think, your Honor, Mr. Smith said renewals and depreciations?

HIS HONOR: Maintenance is one thing, and providing new rolling stock is another.

MR. RITCHIE: Mr. Smith said renewals and depreciations.

DR. MADDEN: "Votes of the proprietors are requested for additional rolling stock, £75,000."

MR. MILLER: That applies to the distinct subject of a new line.

DR. MADDEN: "At the conclusion of the business of the half-yearly meeting a special meeting will be held for the purpose of creating additional capital required to execute the works which have already been approved by the proprietors and sanctioned by the several Acts of Parliament. The amount proposed to be created is £742,830 of ordinary stock, which the Directors propose shall be issued as required for carrying on the works." That is from the report of the London and North-Western Railway.

MR. MILLER: My friend does not know that that relates simply to the equipment of an entirely new line.

DR. MADDEN: Mr. Smith says not so.

MR. MILLER: He tells us nothing of the kind.

HIS HONOR: There would, it appears, be a variety of practices.

MR. MILLER: That is a most cogent argument in support of my contention, your Honor.

HIS HONOR: You do find that the Directors of a Company pay so much for the capital account during the half-year, and the Chairman says that he had tried to carry a reduction of so much per cent. in order to put it into stock, because they were making a good dividend, and did not like to put so much to capital.

MR. MILLER: I am very much obliged to your Honor, because that supports my contention at this moment. I said I attach no value to the evidence of these experts as to the universal usage. To our knowledge there is no universal usage.

HIS HONOR: Companies will do that, and yet, according to the Statute Law of England, new engines should be charged to capital account.

MR. MILLER: And in these colonies we follow the Statute, but we necessarily look to the practice of the Directors.

MR. MILLER *(continuing)* said this had assisted his contention that the evidence of the experts had practically no value, and they would have to go back, as he said, to the beginning, simply and solely to what was within the four corners of the contract. If that were so, the learned Judge would direct the Jury as to what their finding would be. He claimed that from the Judge, and respectfully asked him to direct them. If he did so the issue would be between the parties and the Judge, and not with the Jury at all. There was one item to which he would call their particular attention. Concerning the first item—"Erection and fitting-up internally of store in Hobart yard, and alteration of original store to form continuation of carpenters' shop,"—he would, after the illustrations given about the additions to the house instanced by his learned friend, Dr. Madden, leave it to their common sense to arrive at a conclusion as to what it should be charged to. But he would ask them if they had ever heard of such nonsensical stuff as it was, to say that if it was agreed upon between the parties that the Company should have the right to replace one work by another, that did not give them the right to the fixings required if it was necessary that the work should be housed and covered over to protect it from the weather. "You shall be allowed an engine, but we will not allow you that which is absolutely necessary to fix it in its place and cover it." It was like a landlord who, when his tenant's stove smoked, said, "I admit that is unworkable; you shall have another, and I will pay for it." Well, suppose the man purchased another stove and had it fixed in its place, and then the landlord turned round and said, "I allow you the stove, but not the fixings." Would not this be an insult to the man?

DR. MADDEN: If that were the case we would not object.

MR. MILLER said they did object to it. All the works were proper expenditure for carrying on the working of the line, but the Government said the Company must pay for them. His learned friend gave one or two illustrations, one of which was, "Suppose you bought a set of chessmen; the seller might say, 'There are the chessmen, you are entitled to them, but not the box; you must pay for that.'" Was it not utter nonsense? They might just as well say the wrapping of a parcel should be charged for. This brought him to the conclusion of his address. His learned friend had paid £640 into Court for two items, £600 and £40, and he (Mr. Miller) claimed, as a matter of law, that they were entitled to the interest on this amount, which had not been paid into Court.

DR. MADDEN: But it is paid.

HIS HONOR: That would be snapping at a verdict, Mr. Miller, and your position is not dignified in adopting such a course. I take it that your position is more dignified than that.

MR. MILLER: I take it at your Honor's suggestion.

DR. MADDEN: You might understand that the interest was paid into Court, and you can have it as soon you like.

MR. MILLER said his learned friend had not made this perfectly clear to him. (Continuing) he said that there was one item upon which there had not been any exact evidence, and that was trustees' remuneration. They contended that they had not charged for Directors' expenses. It was admitted that the Company were entitled to the costs of management, and these were necessary costs of the management of some portion of the undertaking. A certain fund was created, and managed by the Directors, and therefore they were entitled by law to claim their remuneration as part of the costs of management. Where there were trustees it was management in connection with the working of the line for which the Company were entitled to charge. Before he took leave of the case he desired to say that he did so with the most unfaltering confidence that whatever conclusion the Court came to, either from the Judge or the Jury, the Company would have no right to say that justice had not been administered according to the best intentions of the tribunal. The Company would be bound to acknowledge that the fullest justice had been done. It had been shown to them that these poor unfortunate creatures at home were not getting one penny interest, and were told that the reason was that there had been an illegal withholding of the money by the Tasmanian Government. Their complaint was the cry of suffering humanity, and they would not be worthy of their manhood if they did not listen to it. Each party looked at the contract through their own light, and these people at home felt that they were right, and that they were led to believe that they should receive money that they had not received. Considering the suffering and privation—that these people looked upon the Colony in an unfavourable light, and regarded a Tasmanian jury as one whose verdict would be influenced—

HIS HONOR: We have no evidence of this kind before the Court.

MR. MILLER: It is merely hypothetical, your Honor. The jury if they had proclivities and antipathies must not be governed by them, but take all the leading points of the question into consideration, and give their decision in accordance with their own impressions. He felt conscious that the result of their deliberations would be consistent with justice, and might lead to the sweeping away of all difficulties, and the Government might in the most effective manner purchase the line. Whatever the value of the work might be, the Colony received all the advantages from it. The Government could put a stop to everything in connection with the line. They could purchase it; and more than that, they had this one-sided advantage over the Company: if, by reason of great mineral wealth the Company's prospects were to brighten, the Colony could anticipate them and say, "This is a great work and a profitable work; these men shall not have it; we are entitled to take it at its present value, with all its magnificent possibilities, and we do take it." That result

might happen at any time, and it would not be in the power of the Company to prevent it. But he was sure the Company, whenever such a consummation did come, would be only too glad to jettison a portion of their rights as they had done before; they would gladly throw overboard a portion of their cargo in order that they might get rid of the heartburnings and bitterness now in existence. But if this were not done, the Government could, at least, as Mr. Speight had suggested in the report which had been referred to, come to some fresh agreement. They might come to some equitable arrangement under which the railway might become of immense advantage to Tasmania, and the Colony would then receive from this national undertaking all those benefits accruing from the extension of civilization and progress, and the growth of commerce which were contemplated by the original promoters of the undertaking on the part of the Colony when the Commission published their report.

His Honor: I will sum up to-morrow morning at half-past 10.

Dr. Madden intimated that owing to the payment of £640 into Court, it would be necessary to amend the pleas.

His Honor said his idea was that both sides should amend the pleas, and put them straight. He was going to refer to the matter in his summing up. He knew that the action taken by the Crown was somewhat new to him and new to this Court, and issue might be raised *ad infinitum*. He was very much inclined to think that they raised the question whether their pleas were not equivalent to the ancient plea *nil debit*—he owes nothing. This was one of the prerogatives of the Crown; the plea *nil debit* having been raised and issue joined, covered all possible defences.

Mr. Ritchie: Does your Honor think it would raise the question of payment by profits under the Disputes Settlement Act?

His Honor: It would cover the defence of the Statute of Limitations, and therefore I think it would. It certainly is very desirable that the whole thing should be put right.

The Court then adjourned.

Tuesday, 14th May, 1889.

The Court sat at 10·30 A.M.

His Honor said:—Gentlemen of the Jury.—The case now comes to you and to myself in order that we may do our best to arrive at a just decision, and I do not take the case out of the ordinary category of cases in this Court in any way. We know but one class of cases in this Court. Two persons differ, and they come to us to settle their differences. They bring their case to a special Jury and a Judge in this Court, who hear the case and decide, and in that way only we deal with this and every other case. This is a supplication—that being the mode of proceeding against the Crown in this Colony. The Tasmanian Main Line Railway Company are the suppliants, and Her Majesty the Queen, as representing the Colony, is the defendant. The Main Line Railway Company has come to the Court and says, by its supplication, that an agreement was entered into between the Company and the Colony, and that the Colony has broken the agreement. It has broken the agreement by not paying money to the Company which they claim was due to them under that agreement, and the Company seeks redress at our hands for that breach of contract. The contract set out that the Colony was to guarantee interest at the rate of five per cent. per annum on a sum not exceeding £650,000, to be expended in the construction of the line of Railway. We know, and it is admitted, that more than £650,000 was expended in making the Railway, and therefore the full amount of guarantee arises, viz., £32,500; therefore we may treat the guarantee as a guarantee for the payment of £32,500; and now the Company say you have failed to pay us that sum to the extent at least of £14,527. The Colony meets that by saying that though under the agreement the Governor is bound to pay this £32,500 a year, there is a provision that if the profits in any year—first, these profits were to be ascertained quarterly, and then the law was altered—if there are profits in any year arising from the working of the Railway, they are to be deducted from the interest of £32,500. The Colony say there are profits to a considerable sum which we have to obtain under the contract, and we claim our right to obtain them: and whether the Colony is right or wrong is the issue that comes before you. That will depend upon the construction of the contract, as it relates to some eight or nine items, so small is the issue really reduced to. Then, the Colony says that in arriving at the amount of profits, you, the Company, are bound to give us accounts of the sum total of your receipts, and the sum total of your expenditure, and the difference between those amounts will make up the profits. Those accounts have been rendered, and the Colony says our case is this,—that you have included in those accounts items which are not properly included in your expenditure. The issue is now narrowed down to the question as to whether those items have been reasonably incurred for railway expenditure—whether they have been included in violation of the terms of the contract, or in accordance with the terms and provisions of the contract. The items admitted are collected on the back of the document put in. I think you have this paper, and before I address you on the construction of the document, or on the facts, I should like to see that you have before you the correct figures. We get at them most easily by the particulars which were handed to me. There is at the end of the paper a summary, and it is that summary I should like you, or at least your Foreman, to have a copy of.

Mr. Walch said they had the document, but not precisely what they wanted.

Mr. Miller handed copies of the printed document to the Jury.

HIS HONOR: That is the summary—you have it now before you. In the expenditure for the year 1883 the first item is the alteration of the store at Hobart. As to that first item—the alteration of the store at Hobart—a sum of £40 has been paid off for old fittings. The second item—building the covering and chimney stack, &c., £721 13*s.* 5*d.*—that stands. The additions to the Hobart Station—the item for putting up the porch—that is to stand. O'Brien's Bridge Station, £139 9*s.* 8*d.*, has been paid. The item gatekeepers' lodges, £736 14*s.* 11*d.*, has been reduced by £600 paid into Court. These are the reductions of the claims for 1883. For 1884 the additions to the Jericho siding have been absolutely paid; the other two items stand. Then, subsequently, there is an amount paid for remuneration of trustees in 1883—£472 10*s.* Then the stoppages on the four quarterly accounts, £100,—that is struck out, as it has been absolutely paid. The amount claimed is, therefore, now reduced by £40, £139 9*s.* 8*d.*, £600, £50 4*s.* 5*d.*, and £100; making £929 14*s.* 1*d.* reductions. This sum of £929 14*s.* 1*d.* taken off the £14,627 1*s.* 6*d.* claimed leaves a balance of £13,697 7*s.* 5*d.* The account does not show the interest; but it is not affected by that; those are the figures, and they ask an addition to that for interest on the amount. I do not know if it has been calculated, but they ask it at the rate of 5 per cent. We have no evidence before us of any interest, but the claim is 5 per cent., and the jury are at liberty to give that as damages; the jury are entitled to give as damages interest from the time the amounts ought to have been paid to the date of the action.

MR. MILLER: I understood the interest was added to the amounts paid into Court; the amount of that, Your Honor, ought to have—

HIS HONOR: I do not want it on the amount paid into Court, because I have taken out these items. It may be a question for the jury, but there is no evidence of the amount of interest claimed. I want what is due on the balance

MR. MILLER: £218 19*s.* 5*d.* is the amount of interest paid in.

HIS HONOR: That is precisely what we don't want. We want the interest on the other amounts—the interest on what has not been paid in.

MR. RITCHIE: The plaintiffs claim interest from the date the amounts were due to the date of the action.

MR. MILLER: It will be easily calculated.

HIS HONOR: Yes, but we have no evidence as to what the interest is. The amount due on the expenditure for the year 1883 would be due early in 1884, and the amounts for 1884 early in 1885. The amount of the interest will not be a very serious calculation to make. There are, then, five items in dispute in the course of 1883, and three items in 1884: eight items only in dispute. The question is as to whether those items can be allowed to affect the question of profit as between the Main Line Railway Company and the Colony? The profit I take to be the revenue of the railway after deducting the cost of maintenance and working. This we get from the accounts of the Company. The last Act is the newest revelation on the interpretation of the contract, although it uses different expressions in different places. This Act passed in 1882 says:—"In the accounts of the Company to be rendered pursuant to the said Contract, the revenue and expenditure for and in respect of the maintenance and working of the said Railway shall be adjusted on the principle of yearly balances." Before, they used to make quarterly balances. This was altered, and this is the alteration made by the Legislature. They were entitled to take the expenditure necessary for the working and maintenance of the Railway; that is, the accounts to be rendered are to show the revenue of the line and the expenditure on account of the working and maintenance of the railway. The real question is, what do these words maintenance and working include? The Act goes on to say:—"If such yearly balance shows a profit upon the working of the said railway for such year, such profit shall be deducted from the guaranteed interest as provided by the Contract." In this case the Act drops the word "maintenance," and uses the word "working." As a matter of English the word would include maintenance, for you cannot work a railway without maintaining it, although you can maintain a line of railway without working it. Well, what is included in the working of a line of railway? The first thing is the maintenance of the permanent way. If you are to work a railway you must maintain the permanent way, and you must maintain your engines. I am of opinion, as a matter of English, that the term working includes maintenance: the greater includes the less. You cannot work a railway if you do not maintain it; and you cannot work engines if you do not maintain those engines. That is the meaning of the word "working" under the Act. Where there is a contract—and of course you have each a copy of it, and you will see in what way the words affect my mind—it is my duty to construe it and to take the responsibility. I say what my opinion is, and I give my reasons for it, and having stated my opinions I leave it for counsel at the bar to object and set me right if I am wrong. This contract sets out by providing for the construction, working, and maintenance of the main line: construction is completed, and what we have now to deal with is the maintenance and working. The question that first strikes one is this—does not that mean all that is necessary for carrying on the railway? There is no mention whatever of anything else; the agreement is silent beyond that. There is no provision between the parties for any other items than maintenance and working; if there was we should expect to find them here. To those who prepared this contract, without attributing to them any deep insight or power of looking into the future, it would be perfectly manifest that as time went on there must be an increase of rolling stock, and an increase of stations for the accommodation of the passenger and goods traffic, unless the Colony was to stand where it was and to make no progress, or that the

railway was to continue running with the same capital and stock with which it started at the first. I suppose in every country increase of traffic is looked for, in fact it is shown that as a rule a railway draws traffic to itself; therefore in the progress of years, any reasonable man must take it that there must be an increasing traffic that would necessarily require extra rolling stock and extra station and passenger accommodation. So, except as to what is included in maintenance and working, the contract is absolutely silent as to the necessities that must arise, and that in the near future. If there was necessity to specially mention these things, it would be a very imperfect contract if it did not do so. It is the contention of the Crown that no provision whatever of this kind is made in the contract. In ordinary railway working agreements provision is expressly made for such expenditure as that which is in dispute. I give you a case—the Seven Oaks, Maidstone, and Tunbridge Railway Company *v.* London, Chatham, and Dover Railway Company, (vol. xi., Law Reports, Chancery Division, p. 630.) The provisions of the Act under which the Company was formed provide that—"If and whenever the development of the traffic upon the Maidstone line shall be such as to require any extension or enlargement of the station, or other necessary accommodation thereon, the Dover Company will execute such works as, failing agreement between them and the company as to the nature and extent thereof, may be determined by arbitration in manner hereinafter provided; and they shall be entitled to deduct from the gross earnings of the line, and as part of the actual cost of working, a sum equal to £5 per cent. per annum on the capital expended by them for such purposes." That is apparently one of the ordinary provisions in making working contracts, providing how whatever is necessary beyond maintenance will have to be made. As this contract is obviously silent as to any such express provision as this, it is to be taken as subject to the provisions we find in it, and not otherwise. If the Crown's contention prevailed it would come to this, that the Company, in order to gain £32,500 a year, would have to maintain and work the line "so as to afford all sufficient station accommodation and due facilities for the passenger and goods traffic over every portion of the line." They would have to do all that before they got the guaranteed interest. Did it mean that for the whole period of the guarantee they were to continue to work the line so as to afford all sufficient station accommodation and due facilities for traffic, or did it mean simply that they were to maintain it as it was? It is my opinion that they had to work the line, and if traffic increased they would have to provide extra carriages and rolling stock, and if they were bound to do that, then we come back to the question, at whose expense is it to be? Take it to be at the expense of the Company, in what position are they? They receive £32,500 interest on the £650,000 capital expended, but as passenger traffic increases they will have to find new capital to provide new rolling stock and station accommodation, and to afford due facilities for the increased traffic, and all that would tend to increase the profits. The learned counsel said the Government and the Company divided the profits. I am clearly at issue with him there; they do nothing of the sort. On the contrary, the Government would put the whole of the profits into their own pockets, and the Company would not get sixpence. That is the contract, because until the happy day arrives when the profits exceed the interest on £650,000, until that sum is made, there can be no profits divided. Every farthing goes to reduce the £32,500—every farthing goes until that £32,500 is covered by the profits; so that if the line does make profit, and new capital has to be put in for extra rolling stock and accommodation to meet increasing traffic and profits arise, the Company would not get a sixpence interest on that capital. They would not get any return whatever until the railway was making £32,500 a year beyond the working expenses, because every sixpence that is made up to that goes to reduce the guarantee. That appears on the face of the Contract. In section 8 it is said—"The Governor shall be bound to pay to the Company in Hobart Town quarterly (it is half-yearly now) such amount of money as will with the profit (if any) of the preceding quarter make up the interest at the rate of five per cent. per annum on £650,000"—that is, £32,500 a year. I do not know if that is clear to you, but it is beyond question that it is so in the construction of the Contract. That if it was their duty to spend, say £100,000, from time to time for fresh rolling stock and extra accommodation, they would spend all this, they would not only be out of their capital and all interest on it, but in addition to that all benefits and profits would go the Colony until the railway made more than £32,500. The whole of the profits would go to reduce the guaranteed interest till they were large enough to cover the £32,500. After that had been paid and that happy position arrived at, then the profits would be divisible between the Company and the Government. That is what I now tell the jury. After the railway makes over £32,500, you then divide; the first one per cent. goes to the Company and after that the profits are divided between the Crown and the Company. That is what it would be as I see it, and I only point out the position. Look at the position in which the Company would stand if they had to do this. The question is, were the parties contracting with any such intention either on one side or the other? The Government say we have a right to get this money. I have looked over the contract to see the effect of the different constructions of the language. Is it capable of more than one meaning, or of an extended meaning? If one interpretation gives us that which is reasonable, and another that which is unreasonable, the rule is to give the more reasonable interpretation. Then it has been strongly argued, look at the consequences to the Colony if such a construction is put upon it! That all these works were being constructed out of monies which should go in reduction of the interest; and further, that if the Colony afterwards purchased the line, they would be purchasing back works made with their own money. As far as I see, the Colony is not bound to purchase without it pleases. It can at once purchase and put a stop to all these expenditures if it thinks proper. It has the right to

purchase. It may be that the parties may not agree to terms, but there is the machinery appointed, and it may give twelve months' notice and take the line, and so stop all the expenditure complained of. It can also not take the line. The lines in England are generally managed by companies. They are not bound to take it, and, further, at the end of the thirty years they may put up an entirely new line for themselves. It was pointed out by the learned counsel that this company might go in for an extraordinary equipment, with splendid stations and other works, all built out of the profits of the line—that is not so. They can only put up what is reasonable and necessary for the existing traffic, and they can only obtain sufficient carriages and stock for the accommodation of the existing traffic. It was said they might put up large stations in view of future traffic, or accumulate a large amount of rolling stock. They cannot do this: all they can do is to reasonably supply the exigencies of the present traffic. What would be reasonable and necessary would be a question for a jury in that case. If it was for one moment shown that anything extravagant was purchased to enhance the future value of the railway—that they were trying to build up gorgeous palaces as stations, or obtaining grand rolling stock—a jury would know how to act in a moment, and would allow no such dealing, but would stop such expenditure instantly. I am happy to say that in this case there is no suggestion of anything of the sort, as far as I can see. I asked witnesses what was the natural life of an engine, and how long it might reasonably be kept in active service. The replies were that the average life of an engine was ten years, after which time their utility rapidly ceased. Carriages and waggons remain good from eighteen to twenty years, the best of them; so really they would be swallowed up, so that money spent upon them now will not be for the future, but what has taken place are improvements which will be swallowed up, and they will die a natural death before the end of the thirty years. The Company are bound to provide for station accommodation and all due facilities for traffic. They are bound to do it, and, therefore, they must incur those expenses which one would think were reasonably incurred for the near future. On the other hand, the Government is not bound to purchase the railway, though it might purchase it if it deemed fit; and there can be no suggestion that the Company have put by money in it for the future. It would be a very hard case indeed to say to the Company, "you shall provide all this, and you shall not get your guarantee unless it is provided;" and yet the Colony gets the benefit of the expenditure. Again, suppose they have from time to time to provide money to carry out this contract, say £100,000, the contract contains a provision that "The true meaning and intention of this agreement is that the Company may at all times get 5 per cent. per annum on money expended by them." Would they get their 5 per cent. if they had, in order to get it, to expend another £100,000. That, gentleman, is certainly an argument that has with me some weight. What I have to do is to get at the most reasonable view of the agreement, and I say that these matters, and looking at the financial arrangements, assist one in arriving at the most reasonable construction to put upon this agreement. That being so, is there any portion of this agreement that can be fairly construed so as to provide the means for these improvements necessary upon the increase of traffic? Now, gentlemen, there is one section (6) in the contract that may do so. In calculating profits the reductions to be made are for maintenance and working. I am quite prepared to say maintenance and working generally, as a rule, include works of renewal, maintenance, and working expenses. In regard to the meaning of these words maintenance and working, I have before me the opinion of a very eminent man, a very high authority, that of Sir George Jessel; and I will read that opinion in his own language. In the case of the Seven Oaks Railway *v.* the Dover Railway, L.R., ch. div., vol. xi., the defendants claimed the right to carry out certain works which, they contended, were maintenance, seeing the period of construction was ended. The works in question were the replacement of some stone steps at a railway station. There were some larger steps to be put down instead of smaller. Sir George Jessel said:—"It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it. For instance, if a company had power to maintain the banks of a river which were faced in a particular way, could it be supposed that they were restricted under the words of maintenance to keeping up the banks in precisely the same way when the mode which might have been very good when the banks were originally formed had been very much improved on by the subsequent advance of science. So where a railway company have to maintain a railway, I should not at all doubt that in maintaining it they might use any reasonable improvement. If, for instance, the railway were originally fenced with wooden palings, and it were sought when they were decayed to replace them by an iron fence, I should say that was fully within their power. If the railway originally was made in a deep cutting, and it was thought desirable to face the cutting with brick to make it more secure, I should say that was fair maintenance. And if a railway station was found inconvenient, and it was desirable when it required repairs to alter the arrangement of the rooms or to alter the access or form of access, and so to ameliorate it at the same time that it was put in repair, I should say all that was within the powers of maintenance given by the Legislature; that is, you may maintain by keeping in the same state, and improving the state, always bearing in mind that it must be a maintenance as distinguished from alteration of purpose. I have no doubt, therefore, that this work is authorised by the power to maintain." Well, gentlemen, there you see that what he really says is, that in maintenance you must not have alteration of purpose or design, but you may improve, and in a subsequent part of the case he says:—"He prefers steel rails to iron rails. Whenever the iron rails are worn out he directs them to be relaid with steel. As I said before, that is maintenance with an improvement." The Government say, "Yes; we have acted up to that; we have already allowed all works of maintenance."

That, gentlemen, is the definition of maintenance, and would include certain improvements, and if the case stood there that would be my guide; but it goes on to say, in the same clause of the contract, not only to "maintain and work the said line of railway in an efficient manner," but adds, "so as to afford all sufficient station accommodation, and due facilities for the passenger and goods traffic of every portion of the line." If they have to improve the station, are they not bound to do so, to enlarge it if not big enough? If their goods store were too small, and they had to increase that, would not that be a fair charge to "sufficient station accommodation?" Could they get their £32,500 without? What are the words? They are "to maintain and work the said line of railway, so as to 'afford.'" What in that contract comes within the meaning of work in that "afford?" "All sufficient station accommodation, and due facilities for passenger and goods traffic." Are these things not included in maintenance and working by the parties themselves in the language they have used? I am inclined to think so: if not, there is a hiatus in the agreement. I think this is the best construction that can be put upon the agreement. If I do that, instead of a hiatus in the agreement it becomes a perfect one, because there is an express provision for doing all that is necessary to be done to enable the Company to secure this guarantee. If this is not so, then there is a hiatus—there is no provision made in the contract that unless this or that is done the £32,500 cannot be earned. The question is, what do the words maintain and work mean? If they stood alone I should say that they meant renewals, repairs, and alterations, with improvements if necessary, but when it goes on to say "so as to afford sufficient accommodation and facilities for traffic," do not the parties enlarge the meaning of the words?—that is, to mean to continue during the whole time to afford all due facilities throughout every portion of the line. Whether that was or was not the intention of the parties, the language used seems to me to bear that meaning. If I am right (but I confess it is not always easy to come to a decision on such a point) then this is the construction I put upon it, and it appears to be the most reasonable. That is the construction I put upon it; and I shall tell you that maintaining and working do not embrace simply making, repairs, and renewals, but they embrace whatever is necessary—reasonably necessary—to afford station accommodation and facilities for passenger and goods traffic in every portion of the line. I do not go into the expert evidence, as it appears to me to be wholly inapplicable to the issue. In that way the issue comes down to a very small one indeed. It is admitted without dispute that all these works have been necessitated by the increased traffic—that they were rendered necessary; and it is not disputed that they are reasonable works for the purposes for which they were designed. Of course the other side made another contention and another construction of the contract, and I think I might fairly ask you presently to find if their construction should be the right one, what would be the amount due, but there is one question before I come to that. What I have said will apply to the items store in Hobart yard, gatekeepers' lodges, and the rolling stock. The question for you is, "Do you think that, in accordance with the true construction of the contract as I have given it to you, these works were reasonably necessary in order to afford all sufficient station accommodation and due facilities for the passenger and goods traffic in every portion of the line?" If the rolling stock were out of order the Company were bound to repair the whole, to provide whatever might be necessary to afford due facilities for maintaining the passenger and goods traffic. The question is, were these increased rolling stock, increased works, and increased storage necessary as a consequence of increased traffic? Do you think that they were reasonable works, and reasonably necessary? If so, it would be open to question whether they would not come under even the Crown's restricted interpretation of maintenance. There is one other item, and that is the amount for remuneration of trustees. Well, if under the Act, which enabled the Colony to contract with a company or an individual—I shall take the individual first—say, in order to raise more money to carry out his contract, he goes and mortgages his house. I say the cost of that mortgage would not be a fair charge to the Colony, who say, if in consequence of impecuniosity he take this mode of raising money when he was in a difficulty, the Colony should not be asked to pay for it. And, if in any impecunious company the shareholders should choose to go and borrow, the Colony is not to pay for that; but if it is the natural consequence of the contract itself that they have to go and borrow, then the Colony is bound to pay for the expenses reasonably incurred for this purpose. This is a matter for you to deal with. If they have satisfied you that this was a reasonable expense arising from carrying out this contract in a reasonable way, then they would be entitled to it. If so, give it to them. But if it is one arising from the impecuniosity of the Company, and the extraordinary method of raising the money, then they are not entitled to this amount of £472 10*s.* for remuneration of trustees.

But, if I am wrong in the construction I put on this contract, in order that the expense of these proceedings should not be lost, I will also ask you to find the amount that would be due to the Colony upon its construction of the contract. I will ask you, first of all, to decide on my view of the construction, and next to find on their view, and either side will then be able to move that the verdict be set aside and a verdict entered on the alternative view of the contract. The Government say maintenance and working are not expanded beyond their ordinary meaning. Their ordinary meaning includes repairs, renewals, with ordinary improvements in the course of alterations. The Government say we have allowed all that—we have allowed renewals of line, renewals of carriages, and renewals of engines—but the items objected to are new works, and we claim that they are works of construction, and have no right to be deducted from the receipts; and, gentlemen, this is borne out, so far as the evidence of the railway officials, Messrs. Cundy and Ellis, is concerned. Mr. Ellis said he had examined the receipts and expenditure. In cross-examination on this subject he

says all these objectionable items were new and did not exist in 1882; the rolling stock did not exist in 1882; the first four items did not exist in 1882, and the rolling items the same. There were amounts for repairs, and these the Government allowed. A new engine to replace a worn out one had been allowed, and rails both of a weightier and better class had also been allowed. Mr. Cundy deals with the old store, but this is taken out of consideration. In cross-examination he says "the rolling stock now claimed for is new stock. We had in 1883-4 eleven engines, we have also an additional engine, making twelve, and one additional engine is allowed in substitution for an old one." With this exception, the word substitution is not heard of. Mr. Grant in his evidence took the Crown by surprise. There are the letters showing the items as "new expenditure during year 1883 (not being renewals) on works that did not exist in 1882." The Crown contends these are works outside repairs, renewals, or alterations, that they are new works, and have no right to be charged to maintenance—to what is called maintenance and working. I have read to you the definition of maintenance—you must keep the line up as it was with a somewhat similar rolling stock, but you may improve whilst maintaining, but anything beyond that, the Colony says, must come out of the pockets of the Company: and the question, gentlemen, here is (you have got these items before you) to what, in your opinion, should these items be charged, and to what amount? Under the contract the Company are bound to repair not only the existing stock, but also apparently the whole of the new stock. If they are bound to do that they are bound to go beyond the ordinary meaning of maintenance, and working a thing existing at the date of the contract. If they are bound to increase the new stock, and it appears to me that they must increase it in some way, and if they are bound to repair the stock, they must enlarge their workshops. They say we had an engine, an old portable engine. Instead of keeping this old portable engine and machinery to do the work, they say "it is too frail," so they purchase a new one, which saves both fuel and wages, and the Colony sanctions this expenditure. The question is, whether the appurtenances should be allowed with the new engine. You allow a man a very good engine, and there is your boiler, but we cannot give you a chimney-stack nor a foundation or place in which to keep it. I must say there is an inconsistency about this, that you are granting him as a necessary expenditure that which is of no use whatever unless a large sum is afterwards expended on it. The engine is covered by a shed, and the question whether this would not go as an alteration with improvement. If you think it goes beyond that, it is construction; if you think it is an alteration with improvement, deal with it accordingly. I think that on this issue, again, the evidence of the experts has no particular meaning and no particular effect. I have told you what maintaining is and how I have based my opinion on the case cited. The question is whether the items which the Government claim to be struck out come within the definition of maintenance, or if any of them come within the definition of maintenance that I have given now—that is, whether they are renewals and repairs, or have they been improvements in the course of alterations? If they come within the definition, the Crown would be liable; but if they do not come within the definition, then the Crown would not be liable for them. I am not going to enlarge upon this point, whether this or that is a mere addition or improvement of existing things; I will leave you to use your own common sense as to that. There are many little things a railway requires in the way of providing accommodation, such, for instance, as the third item on the list—putting up porch in front of station, £91—which you could hardly call construction. Traffic had increased, people were put to inconvenience, and there was certainly danger to passengers there. This is one of the small matters in regard to maintenance to which it is necessary to draw your attention. The Crown says it is not maintenance, but that it should come under construction, but that is for you to decide. There was certainly a new verandah placed in front of the station, but the question is whether it is a new structure, or can be brought within the definition of Sir George F. Jessel—maintaining the old thing with improvement. With regard to the gatekeepers' lodges, the Government say there were so many new ones, and these are not a question of maintenance, but one clearly of construction; this is reduced to £136—a very small matter. The most important matter is the rolling stock, and what the Crown says is, "we are ready to allow you for the renewal of the old engine and old carriages, but for every new engine purchased on account of the increasing traffic, and for every new carriage, you must pay and provide capital for it." The Government said that maintenance is strictly limited to maintaining things existing, and not to provide new things. My own opinion is, as I stated on the first question put to you, that it embraces whatever is necessary to maintain the line in an efficient manner, so as to afford all sufficient station accommodation and due facilities for passenger and goods traffic throughout every portion of the line. I do not think that there has been any evidence as to there having been excessive expenditure.

MR. MILLER: I would ask Your Honor was it not expressly conceded as a matter of fact?

HIS HONOR: I have put it that there is no evidence as to that. The second question, gentlemen, is, whether the items come within the definition of maintenance and working, which is contended for by the Crown? Whichever contention is right our work will not be futile, and I am sure that you will be glad to find a verdict that will save another body of seven men from enduring what you have endured. I refrain from commenting upon a great deal that has been said in this case, because I want to keep to the issue and not take up your time, which is of value to you. I have endeavoured to give my reasons for arriving at the view I take of the contract, but I am not infallible, and as I may be wrong and the other construction right, I ask you to find what would be due in that aspect of the case in order that the case may finally be closed. I will not detain you any longer, gentlemen.

The Foreman of the Jury, Mr. C. E. Walch, read the following questions, and asked His Honor if they were what the jury had to decide :—

(1.) Are the works reasonable and proper expenditure to afford all sufficient station accommodation and due facilities for the passenger and goods traffic on every portion of the line?

(2.) Do the items objected to come within the meaning of maintenance and working, according to the construction contended for by the Crown?

His Honor: Yes, that is right.

The Jury then retired to consider their verdict.

After the Jury had retired, Dr. Madden called His Honor's attention to the fact that his reasoning by which he arrived at the interpretation of the contract was that the contract itself was not very clear as to the matter involved in the present contention. He therefore had to look at it in such a way as to give it a reasonable meaning, and that in so reasoning he told the jury that the effect of the present contention for the defendant would be that the Company might have to expend £100,000 in addition to the original cost before they could get the £32,500 guaranteed by the Government; and he said to the jury, could it be said they received the £32,500 under these circumstances? He, Dr. Madden, argued that that was a fallacious view, because the contract imposed on the Company an express obligation to construct, maintain, and work the railway without in any way using any special language to relieve them from that responsibility or obligation, and therefore they were bound to carry it out in the full, and to find the means of carrying it out. The Government promised them, not that they would find £32,500 for a dividend, but that they would receive £32,500 in aid of profits for a subsidy. And therefore, although they might have to expend in discharge of their obligation under the contract considerable amounts, still they got the £32,500 within the terms of the contract.

His Honor asked, as to the other point, how did Dr. Madden answer that? There might be a very long period during which the Company would have to go on spending considerable sums to attract traffic and to promote traffic, and during that time, while they were spending large sums, they would not be receiving anything by way of interest in like proportion; and he asked was it likely that both parties did not contemplate that might possibly be, and omit to expressly refer to it in the contract?

Dr. Madden said very likely both parties were quite aware of that; but every Railway Company, and everybody embarking in an enterprise, recognised the fact that it must walk before it ran, and there must be, in the earlier part of its existence, practically a time of dulness; but the Company chose to take that risk as a speculation, in view of future considerable profits. In this case no doubt both parties looked to that; and it was for that reason the Government said we will aid you while you are speculating on this enterprise, which involves advantage to us by the sum of £32,500 per annum, not to provide dividends for you, but to keep you from starving.

Mr. Miller said Dr. Madden had no right to reply to His Honor the Judge.

Dr. Madden said he was not, but that he had a right, if he thought fit, to except to His Honor's charge after the Jury had retired.

After an absence of an hour and a half, the Jury returned into Court.

The Judges' Associate: Gentlemen of the Jury, have you all agreed on your verdict?

The Foreman: We have.

The Judges' Associate: What is your finding?

The Foreman: We find that all the works and rolling stock objected to by the Crown during the years 1883 and 1884, with the exception of the item for remuneration to trustees, are reasonable expenditure so as to afford all sufficient station accommodation and due facilities for the proper conduct of the passenger and goods traffic of every portion of the line. On the second issue, whether all or any of the items charged in the account come within the definition maintenance and working, we find as follows :—Erection of store in Hobart yard, No; building the covering to engine and chimney stack, Yes; putting up porch, No; gatekeepers' lodges, No; carriages, waggons, engines, and trucks, Yes; remuneration to trustees, No.

His Honor: It appears from the figures that the total amount of the claim would be £13,697 7*s.* 5*d.*; the trustees' remuneration would be £472 10*s.*; deduct the one from the other and the balance is £13,224 17*s.* 5*d.* That appears to be the amount.

The Foreman: Then the question of interest—we give that at 5 per cent.

His Honor: That will be calculated, I suppose. If my figures are right, £13,224 17*s.* 5*d.* will be the amount of your verdict, with interest to be calculated upon that, at the rate of 5 per cent., from the time the several amounts became due up to the commencement of the suit.

The Foreman assented.

His Honor: Then I may discharge the Jury. Both sides have leave to amend the pleadings in any way necessary to support the verdict.

The Foreman had been requested by the Jury to call the attention of His Honor to the direct pecuniary loss and great inconvenience to which they had been put in attending the sitting of this Court. He did not care for himself, but his fellow jurymen wished him to say that they had been put to great inconvenience and direct pecuniary loss.

His Honor agreed with the statement; but, as the Jury were aware, he had no control over the public funds or finances, and could do no more than allow them the amount which the law permitted. It was not in his power to make them any recompense. The point they raised suggested that those who conducted such cases should have respect to the time they kept a Jury in the box. He had no power to go further.

Mr. Miller suggested that His Honor might have no objection to forward any special recommendation that might be suggested to the Government in a case of this kind.

His Honor would be quite willing to do anything he could should the Jury desire it. It had been a very protracted hearing which had taken place.

The Court then adjourned.

CORRIGENDA.

Page 17, 21 lines from bottom, *for* "He would not call this reputation, but in one sense it was reputation, &c.," *read* "repudiation" in both instances.

Page 54, Mr. Grant's evidence, question 4, *for* "consulting engineer," *read* "assisting or consulting engineer." In question 8, *for* "the sum of £100,000," *read* "a further sum of £100,000."

Page 57, in last line but one of Mr. Grant's letter, *for* "available rolling stock," *read* "available funds."

Page 59, question 86, *for* "draw out a capital account," *read* "originate some form of capital account." Question 87, *for* "general account," *read* "special account."

Page 86, Mr. Back's evidence, question 46, *for* "permanent way," *read* "rolling stock."

WILLIAM THOMAS STRUTT,
GOVERNMENT PRINTER, TASMANIA.

IN THE SUPREME COURT OF TASMANIA.

SECOND TERM—SITTINGS IN BANCO.

TUESDAY, 2ND JULY, 1889.

(Before their Honors SIR LAMBERT DOBSON, *Knight, Chief Justice,* MR. JUSTICE DODDS, *and* MR. JUSTICE ADAMS.

THE QUEEN

against

THE TASMANIAN MAIN LINE RAILWAY COMPANY.

THE ATTORNEY-GENERAL (Hon. A. Inglis Clark) appeared, with MR. JOHN M'INTYRE (instructed by the Crown Solicitor), on behalf of the Crown.

THE ATTORNEY-GENERAL, in making his motion, said: May it please your Honors. In the case of the Tasmanian Main Line Railway Company against the Queen, which was tried last month, and resulted in a verdict for the suppliants, I appear now, with my friend Mr. M'Intyre, to apply for a new trial—that is for a *rule nisi*, calling upon the suppliants to show cause why a new trial should not be granted—and I do so on three several grounds.

MR. JUSTICE DODDS: Mr. Attorney, before you argue this motion I wish to say that the supplication was filed at a time when I was a member of the Administration, and my name as Attorney-General appears on the record as pleading on behalf of Her Majesty. Now, the practice of the English Courts is that a Judge who has been at any time counsel in a case, if possible abstains from taking part in any judgment upon it; and this practice has been invariably followed in the Australian Courts. It is clear, therefore, I think, that I am bound to be guided by the universal practice of the Supreme Courts of England and the Colonies as to the part I take in this case, and it appears to me that I should abstain from taking any part in the judgment which is now about to be pronounced upon it.

MR. JUSTICE ADAMS: I desire to say that the rule just laid down by my learned colleague, Mr. Justice Dodds, applies to me equally, inasmuch as some time ago, when the supplication was first filed and the pleadings first put in, I was one of the counsel for the Crown at that particular time, and so the rule applies to me as well as to the learned Judge who has just spoken.

THE CHIEF JUSTICE: I can only say that in a case of so much importance and responsibility I regret that I shall not have the valuable services of my two colleagues; but, under the circumstances, I shall have to do my best single-handed.

THE ATTORNEY-GENERAL, continuing his address, said: Your Honors, the grounds upon which we make our application are the following:—First: Misdirection of the jury by the presiding Judge on the interpretation of the contract on which the action was founded, and particularly of the words "maintain and work" as contained therein. Second: That the verdict is against the weight of evidence. Third: That the verdict consisted of inconsistent findings. The first ground upon which this application is based is one which has been very seldom raised and relied upon to support a similar application in this Court. I therefore feel myself in a very unusual and somewhat embarrassing position, and I therefore desire at the outset to bespeak the forbearance of the Court to the arguments I shall have to offer.

THE CHIEF JUSTICE: There is nothing uncommon in the course. I have myself moved similar motions on similar grounds as counsel in this Court—and often successfully.

THE ATTORNEY-GENERAL: I said seldom, your Honor. I am prompted to make this special appeal for forbearance because a large part of what I shall feel it my duty to say to the Court will consist of a statement of, and an attempt to apply to this case, fundamental maxims with which the Court is quite as familiar as I am, and which the Court has far more frequently been called upon to apply to concrete cases than I have. But I think I may venture to make the preliminary statement that all errors in reasoning, and all the erroneous deductions of mankind in general, arise from a failure to apply fundamental principles as rigorously and consistently as the attainment of correct conclusions require, and that whenever a Judge misdirects a jury upon the question of the true meaning of a written contract, it is because he overlooks, or unconsciously departs from, one or more of the fundamental rules that should guide him in the construction of that document; and so we cannot escape from the position that if, in this case, the learned Judge had misdirected the jury, it is because he has failed to apply or departed from certain fundamental maxims of interpretation when directing the jury in regard to this contract. The canons of interpretation recognised by the English Courts are somewhat numerous and varied; but they are all cognate and inter-independent, and

many of them are only subsidiary branches of more comprehensive rules. I shall have to refer in course of my argument to some of these subsidiary rules, and the first fundamental maxim upon which I shall base my argument is that the intention of the parties must be concluded from the whole contract. The language used by Baron Parke in stating this maxim in the case *Ford v. Beech* (11 *Q.B.*, 866), is as follows:—

"In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied, namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement."

THE CHIEF JUSTICE: That is a fundamental principle which hardly requires repeating, and I think I am justified in saying that, so far from departing from it, I included in my summing up that the jury were to consider what the intention of the parties must have been, and what could be reasonably constructed from the whole agreement.

THE ATTORNEY-GENERAL: I am doing my part to the best of my ability; and if your Honor—

THE CHIEF JUSTICE: I quite understand you, Mr. Attorney, and I interrupt you not in any way to obstruct you in your argument, but only to point out what I really did do.

THE ATTORNEY-GENERAL: Perhaps your Honor will also permit me to refer to the well-known cognate maxim included by *Broome* in his collection of legal maxims relating to the interpretations of deeds and documents, and which he puts in this form (p. 555):—

"*A passage will be best interpreted by reference to that which precedes and follows it.*"

To which he adds:—

"It is a true and important rule of construction that the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus;* that is to say, every part of it should be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done; or, in other words, the construction must be made upon the entire instrument, and not merely upon disjointed parts of it. The whole context must be considered in endeavouring to collect the intention of the parties, although the immediate object of the inquiry be the meaning of an isolated clause."

Now, it appears to me that His Honor, in his summing up to the jury, based his whole argument upon the wording of the Sixth Clause, totally ignoring the effect of all the rest of the Contract. The Contract is a somewhat lengthy one. It consists of twenty-five separate clauses, to which is attached a very lengthy schedule, and the Contract is also said to be made subject to several Acts of Parliament, known as the Main Line Railway Acts, and I contend that the first false result of His Honor's interpretation of the words "maintain and work" is to authorise the Company to include the cost of additional rolling stock and new works in the expenditure to be deducted from revenue for the purpose of ascertaining the profits of the undertaking in violation of the meaning of the word "profits" as used in the Contract, and particularly as used in the Third Section of the 34 Vict. No. 14, which speaks of "profits of the railway arising from the traffic thereon." The word "profits" is not associated in the Contract or in any of the Main Line Railway Acts with any other words which modify its ordinary and usual meaning.

THE CHIEF JUSTICE: I took the meaning of the word "profits" from the words in the Amending Act, 46 Vict. No. 43, "the revenue, less the expenditure for and in respect of the maintenance and working of the railway." I took that, and if, thus far on our journey, we can both agree to do the same, it will simplify matters very much.

THE ATTORNEY-GENERAL: Yes, your Honor.

THE CHIEF JUSTICE: Will you accept that?

THE ATTORNEY-GENERAL: I accept that; but I contend that your Honor's interpretation of the words "maintain and work" defeats the meaning of the word "profits," which is set out in the Railway Amendment Act as "profits of the railway arising from the traffic thereon."

THE CHIEF JUSTICE: What section is that?

THE ATTORNEY-GENERAL: The Third Section of the 34 Vict. No. 13, and it occurs in three subsequent Sub-sections 3, 4, and 5, where the same language is used—"the profits of the Railway, arising from the traffic thereon." I contend, your Honor, that "profits," as used in the contract and in the Main Line Railway Acts, would include anything gained or acquired by the Company in any one year from the working of the Railway which did not exist at the beginning of that year. I will try to put it in this way. If a line as it exists upon the first of January in any one year is efficiently maintained up to the end of December of that year, so as not to deteriorate in any way in value, and no new works are added to it, and the receipts and expenditure for that period exactly balance, there is neither loss nor profit on that year. And if, in any one year, between January and December, there has been added a new station or new rolling-stock to the value of £10,000, and the Railway has been efficiently maintained throughout its entire length during the year, and there is also a cash balance on the year's operations of a sum of £12,500, then there is actually a profit made of a sum of £32,500, and the Government ought to be relieved of all liability to pay any guaranteed interest for that year.

THE CHIEF JUSTICE: In other words, you include the new station in profits?

THE ATTORNEY-GENERAL: Yes, I should include as "profits" anything gained or acquired in any one year which was non-existent at the beginning of that year, whether in the form of cash at the bank or transmuted into works of various kinds.

THE CHIEF JUSTICE: You say such new works are part of the profits of that year, if made out of the receipts.

THE ATTORNEY-GENERAL: Yes; because, I submit, if no new work is added, but the line is efficiently maintained throughout the year in the same state in which it was at the beginning of the year, and the receipts and expenditure balance, there is neither loss nor profit; and if under such a state of things there is neither loss nor profit, then under a different state of things in which new works have been added, there must be either loss or profit, and as the addition of a new work cannot represent a loss in a year in which the receipts and expenditure exactly balance after paying for such new work, it must represent profit. That is the way I put that argument, and I think the particular language of the Act supports me in it. I would draw your Honor's attention to every word in the phrase, and first to the words "traffic thereon." If we take any given time, say only a few months, or a year, the traffic of the line for that period is, as a fact, carried out by a certain amount of rolling stock, and a certain amount of station accommodation. There must be a certain quantity of each provided to carry on the traffic for a given time, and any excess of receipts over expenditure in regard to the working of that particular amount of rolling stock for that period is profit arising from the traffic of that period. The traffic of that period cannot be charged with costs of works which are meant to carry on the work of another period. The science of book-keeping is now carried to such a nicety that there would be no difficulty in apportioning the work of every locomotive, and every class of carriage and truck used on the line, to its own particular period. They, that is people connected with railway management, talk about the life of every engine, and of every carriage and truck, and can say exactly how much each truck ought to carry in a given time to pay the expenses of running it, and leave a margin to replace it when it is worn out. And I contend that we are entitled to recognise the fact that every truck and every engine and carriage, if it is run constantly, earns a certain profit on its original cost and the cost of maintaining it, and we must not charge the cost of any new truck, or of any ten or fifty new trucks, against the profit made by any other truck. This same truck would continue next year to do its own quantity of work and earn its own profit, and ought not to be burdened with the cost of an additional truck which is required for future traffic, because, as soon as any profit has been made upon the traffic carried by all the trucks and carriages in existence during one of the stated periods for which the profits of the undertaking are to be calculated under the contract, such profit becomes available for the reduction of the guaranteed interest, and cannot be absorbed to provide additional trucks and carriages to carry future traffic during a subsequent period. His Honor has said he felt justified in giving the particular interpretation he did to the words "work and maintain," because it enabled him to give a more reasonable interpretation of the consequences of the contract, and because it provided for more reasonable results with regard to the respective rights, privileges, and obligations of the parties. I presume it will be at once admitted that the term "reasonable" is something of degree. It is very often a question to be decided by a Jury, but sometimes it is in the province of a Judge to determine it. Broadly speaking, a reasonable interpretation of anything may be held to be what would give reasonable and consistent results, while an unreasonable inierpretation would be such as would give unreasonable and inconsistent results; and I contend that if the Company is allowed to charge additional rolling-stock against working expenses, we get most inconsistent results if we look for a moment at what is thus made to follow an increase of traffic.

THE CHIEF JUSTICE: You do not contend that they are bound to provide as traffic increased sufficient rolling stock and engines to work that traffic?

THE ATTORNEY-GENERAL: Not *ad infinitum*.

THE CHIEF JUSTICE: I do not ask *ad infinitum*, but if such additions were reasonable and necessary for the increase of traffic? If the existing engines and carriages would not carry half the passengers and goods tendered along the route, would the Company not be violating the agreement to work the line efficiently?

THE ATTORNEY-GENERAL: Not if they ran four trains a day, working at the utmost capacity which the science of the day says an engine should carry upon that line. Of course, I will come to that branch of my argument later on, but meanwhile, in answer to the question asked, I say no.

THE CHIEF JUSTICE: Then you contend that they would be working efficiently, even if they left part of the goods and passengers behind or along the line of route, assuming that the trains mentioned were run each way, and proved insufficient to accommodate all.

THE ATTORNEY-GENERAL: If they were of the utmost capacity that the science of the age suggests.

THE CHIEF JUSTICE: That was not urged by you at the trial.

THE ATTORNEY-GENERAL: I did not address the jury at the trial, but I do not presume your Honor will tie me down—

HIS HONOR: You do not admit really that to work efficiently they are bound to provide all reasonable accommodation for passengers and goods, and all reasonable rolling stock to carry passengers and goods along that line, but that efficient working might mean a state of matters where one half would be left on the roadside?

THE ATTORNEY-GENERAL: Providing the obligations of the Company are maintained. Later on I will try to say what are those specific obligations. I shall now proceed to point out what I consider the very inconsistent results which would be produced by the interpretation which your Honor has placed upon the contract. Look for one moment at the possible position in which the Company may be placed from time to time, according to the varying fortunes of trade in the Colony. I will give an instance. If in any particular year the profits of the undertaking, excluding the cost

of additional rolling stock and new works amounted to £32,500, and in that same year £10,000 were required to provide additional rolling stock, &c.; if the Company are allowed to charge that £10,000 to maintenance, and thereby get their full amount of guaranteed interest, they would be getting £42,500 according to my contention. And that is just the same position in which they would be if the profits excluding the cost of additional rolling stock and new works reached £42,500, because if the profits reached £42,500 the Colony would have to pay nothing, and if £10,000 was still required for new rolling stock the Company would have to find it out of their own money. Therefore the Company would, by His Honor's interpretation, be just in the same position whether there was sufficient traffic to make a profit of £32,500 or sufficient to make a profit of £42,500. The Company would not be a bit better off in one case than in the other, and the result of the increase of traffic would be of no benefit whatever to them.

MR. JUSTICE DODDS: Would you kindly repeat your argument again?

THE ATTORNEY-GENERAL: I will put it in this way: If in any particular year the Company makes a profit of just £32,500, exclusive of all cost of additional rolling stock and new stations, and in that year they feel bound to spend £10,000 in new rolling stock and new station accommodation, on His Honor's contention the income or profit would be reduced to £22,500, and they get the other £10,000 from the Government. They therefore still get their £32,500, and besides that they have actually added to their property value to the extent of £10,000 in new rolling stock and station accommodation. If in the next year they make £42,500, and have to add £10,000 to their property in new rolling stock and station accommodation, they are no better off. They increase the value of their property each year by £10,000, and have also in each year an income of £32,500, and are virtually in the same position year by year, notwithstanding that the traffic has increased, and the business improved.

MR. JUSTICE DODDS: It makes a difference to the Government. (Laughter.)

THE ATTORNEY-GENERAL: But not to the Company, and that is the inconsistent result of His Honor's interpretation of the contract. According to our contention they are better off every year the traffic increases.

THE CHIEF JUSTICE: There is an apparent inconsistency, but it comes back to what is included in "working expenses and maintenance." I would like you to hark back upon the view of the question that if the Company only ran two trains each way, could they claim £32,500 under this contract?

THE ATTORNEY-GENERAL: I am going to deal thoroughly with that. I have drawn out my arguments in heads, and under one head I will deal with that in detail. His Honor has also said that our interpretation of the contract was a hardship on the Company, and mentioned a possible case in which they might have to spend £100,000 for additional rolling-stock in order to earn the guaranteed interest, but the unfortunate part of his interpretation is that it leaves the Company exposed to that hardship at the very time they are least able to bear it, and only comes to their rescue when it ceases to be so much of a hardship, that is to say, whenever profit thereon is made.

THE CHIEF JUSTICE: Does it not arise that if there is very little traffic they do not want additional rolling-stock?

THE ATTORNEY-GENERAL: Yes, your Honor, but if revenue and expenditure exactly balance one another in one year, it is quite possible, and has happened over and over again, that the traffic in the succeeding year had increased sufficiently to require some more rolling-stock to grapple with it, yet not sufficiently increased to begin to leave a margin. That happens in all sorts of business. You are obliged to get more appliances to keep your head above water before you begin to go to good, and in those years in which the traffic is increasing the additional rolling-stock and station accommodation is required. I say His Honor's interpretation does not come to their rescue in such a case, because they still have to go on adding to their rolling-stock out of their income of £32,500.

THE CHIEF JUSTICE: Does it not stand to reason, that the moment there is a special increase in rolling-stock there must be a substantial increase in traffic, and a substantial increase in profit.

THE ATTORNEY-GENERAL: No, it does not follow. Take the case where a new settlement crops up.

THE CHIEF JUSTICE: Let us keep to the line.

THE ATTORNEY-GENERAL: I mean on the line. Suppose an agricultural or mineral settlement springs up on the line, and a new township is built, and goods are produced to be carried by the rail. The Company wants a new station at that particular point, additional rolling-stock, and probably a stationmaster, clerk, and porter. That new station is just in the same position in which all stations hitherto have been on the line, that is, just paying their own expenses, and no more. There may be three or four other stations requiring additional stock, or the appointment of a clerk or other officer, and yet each of them only cover their own expenses, and therefore there would be no profit.

THE CHIEF JUSTICE: Is not the presumption rather that they would not make that extension without a possible profit?

THE ATTORNEY-GENERAL: I might refer to the evidence taken before the jury, and the accounts rendered by the Main Line Railway Company, to prove the existence of the exact state of matters I am describing.

MR. JUSTICE DODDS: In regard to that argument of agricultural settlement, you stated that the obligation of the Company resolved itself into this, that they were bound to supply as many as four trains, and carry according to the highest results of science: but supposing a development of

settlement, and an increased traffic of accommodation that would far exceed the carrying capacity of the four trains per day, what would be the result?

THE ATTORNEY-GENERAL: They are not bound to do it.

THE CHIEF JUSTICE: Would you call that a reasonable interpretation of the agreement?

THE ATTORNEY-GENERAL: I will endeavour to show that when I come to that particular head in my argument. I say another inconsistent result of His Honor's interpretation is that it has the effect of making this Colony contribute to the cost of independent speculations on the part of the Company, speculations outside the contract, if the same manner of book-keeping is to be continued as has been maintained between the Company and the Government, or if the system of book-keeping that has obtained is a correct one. The Company are only bound to run four trains each way daily. But without going into details on that point at present, I wish to point out that the Contract, generally speaking, was to run a Railway from Hobart to Launceston. The great desire of this Colony was to get railway communication for all purposes, social, commercial, and political, between the great centres of population in this island. As a matter of fact, although your Honor cannot deal with evidence on the point just now, I may be permitted to say, that there is something like 50 per cent. of the population of this island in Hobart, and east and west and south of it, and 40 per cent. in Launceston, and east and west and north of that city, and only about 10 per cent. in the intervening part of the Colony, and the great object of this contract was to establish communication between these two centres of population. Anything like a local or suburban service was no object to us—we did not want it.

THE CHIEF JUSTICE: I am quite sure those who voted for it also thought it would benefit the country.

THE ATTORNEY-GENERAL: Doubtless, Your Honor; but we have to take the words of the contract as we find them, and the great object which the Colony had in view was to construct a great highway over the island, and nothing like a suburban service was contracted for.

THE CHIEF JUSTICE: We have no evidence of that.

THE ATTORNEY-GENERAL: It is not in the contract.

THE CHIEF JUSTICE: According to the contract you have to run through centres of population, and have all convenient stations.

THE ATTORNEY-GENERAL: But not to run special trains to Glenorchy, Bridgewater, or Brighton, which require additional rolling stock to maintain them, while the through service is going on continuously. Such suburban or local service requires additional rolling stock, and is a special speculation for which, in other countries, special companies have been formed, and to carry out which any other company might start to-morrow. But the Company have gone into this speculation, and now we are asked to maintain it, but I contend it is outside of the contract.

THE CHIEF JUSTICE: Of course, if the service is to be limited to four trains, and they are not large enough to carry all passengers and goods, some must be left on the roadside.

THE ATTORNEY-GENERAL: I have my answer to that later on.

THE CHIEF JUSTICE: An answer satisfactory to the passengers? (Laughter.)

THE ATTORNEY-GENERAL: I believe it will be perfectly satisfactory to all concerned. There is another branch of the argument which, perhaps, although somewhat of a diversion, I think may be conveniently introduced here. It was urged at the trial that the hardship, instead of being on the Company in this contract, according to our interpretation, would be shifted on to the Colony by His Honor's interpretation in the event of the Colony ever exercising its right to purchase. His Honor said:—

> "Then it has been strongly argued, look at the consequences to the Colony if such a construction is put upon it! That all these works were being constructed out of moneys which should go in reduction of the interest; and further, that if the Colony afterwards purchased the Line they would be purchasing back works made with their own money. As far as I see, the Colony is not bound to purchase without it pleases."

I submit that this is not a sufficient answer to the contention, because it totally overlooks the peculiar character of the right to purchase. In this case I contend that the right to purchase is not the ordinary statutory right to purchase such as is to be found in the Hobart Tramways Act, where there is a reservation of right to purchase on the part of the Government in case it might some day be detrimental to the public interests that such a work should be held by a private company. The object of the ordinary statutory right of purchase in regard to any undertaking established by private enterprise is to provide for changes that might arise, and that would render such a work undesirable to be in private hands, and as a matter of public policy the Legislature reserves the right of purchase. If, however, that was all that was meant in this case it would have been put in the statute, but it is not there. On the contrary, it is expressly provided by the Act that such a provision shall be included in the contract, and it is put into the contract, and therefore becomes part of the consideration for the guaranteed interest, and ought to be looked at as very closely affecting the interpretation of the contract as to who is to pay for one thing or another.

THE CHIEF JUSTICE: That part of the contract is in the Act. It says there shall be an agreement to, and terms of purchase in the contract.

THE ATTORNEY-GENERAL: If your Honor is with me that the right to purchase is part of the consideration, I have no more to say on that point.

THE CHIEF JUSTICE: As part of the whole, is that not altogether inconsistent?

THE ATTORNEY-GENERAL: I think I am consistent in my contention, and it appears to us that your Honor's reply to the argument used at the trial is not sufficient, and does not dispose of that

aspect of the case. If the right to purchase is part of the consideration for the payment of subsidy, it becomes material to consider whether we will allow the Company to so interpret the contract and so act as we shall be deprived of all the benefits of that part of the consideration.

THE CHIEF JUSTICE: It comes back after all to the question whether money put into the line is the Colony's or the Company's money—whether it was maintenance or working expenses.

THE ATTORNEY-GENERAL: Yes, the arguments range round that central one, but in arguing the question I am looking at it from those various points. And then, your Honor, another result is this: they are not limited by the contract as to how much they shall spend on it in any period—in the second, or the third, or the fourth year, or any particular period. They may spend in the very last year, or say in the last year but one, £100,000 to improve the line and grapple with the increasing traffic of a period subsequent to the termination of the contract.

THE CHIEF JUSTICE: No; they can only do what is reasonable and necessary to be done to fulfil the conditions of the contract. The only expense they can incur is that which is reasonably necessary under the contract to comply with the requirements of traffic. They cannot go beyond that.

THE ATTORNEY-GENERAL: Yes, your Honor, but the Company is the sole judge as to what is to be considered reasonable and necessary.

THE CHIEF JUSTICE: No, the Company are not the sole judges as to what is reasonable; the Colony can say that it is not reasonable, and take it it to a jury.

THE ATTORNEY-GENERAL: They are not the final judges as to the fact, of course, because the matter can be brought to the Court, but that is what it is desired to avoid, and although in that sense they are not the sole judges, they are in the first instance the sole judges as to the expenditure, and there is nothing in the contract as to limitation of expenditure. There is no provision, for instance, as to consultation with the Government as to what shall be considered reasonable and necessary expenditure. They are not bound to consider the Government at all, or to show what amount of expenditure should be undertaken in given circumstances. There is no safeguard provided in the contract by which the Government can interfere or inquire as to the necessity for any expenditure.

THE CHIEF JUSTICE: The Colony may by its representatives go and inspect the books and accounts of the Company at all reasonable times, and may see that the expenditure is correct, and find out whether the Company is acting unreasonably, and if any dispute arises it may come to a jury in this Court, and have the question settled as to whether the expenditure is reasonable or not.

THE ATTORNEY-GENERAL: It would be a very difficult and complicated question for the officers of the Colony to decide as to what was reasonably needed to carry on the traffic—as to whether two or more new engines were wanted, or six or more new carriages, or so many extra trucks. It would be a most difficult thing for the Colony to protect itself in this way, and to require it to do so would be an unreasonable interpretation of the contract. It would be unreasonable that the parties should be put in so difficult a position.

THE CHIEF JUSTICE: I don't know that it is an unreasonable position. It is but a question of everyday work for a jury to decide what is to be considered reasonable and what is not. It is the question to be decided in nearly every action—for malicious prosecution, for instance—what is reasonable or probable cause? What is reasonable is a question for a jury, and a very common one.

THE ATTORNEY-GENERAL: Another point is, that where a sum of money has once been carried to a profit and loss account by the Railway Company in any given year it cannot be afterwards diverted to any other purpose. What I mean is, that where profits have once been earned the amount cannot be appropriated under any other name so as to defeat the rights of the Government to get the guaranteed interest refunded. I will put a case. Suppose that on 15th December in any year there have been earned from £10,000 to £14,000 profits; that the accounts show it, and that it is in no way disputed, but there is a prospect of a large increase of traffic next year, for which provision has to be made: are the Company to be permitted, as it were, to snatch the time between the 15th December and the 31st December—the date at which the accounts have to be closed—and in the meantime to send that money away to pay for additional rolling-stock to meet the demand for next year? If the accounts had to be closed on the 15th December the amount would be profit and nothing else; but, by hurrying up their business and putting it through before the 31st of the month, they send the money away, or pay it to some carriage-maker to buy new carriages to meet the assumed demand for the coming year. Would that—

THE CHIEF JUSTICE: But, Mr. Attorney, are we not now assuming facts that are not before us.

THE ATTORNEY-GENERAL: I am referring to the result of your Honor's reasoning, which was that the conditions of the contract supposed an increase of traffic. Your Honor put it that it would not be unreasonable to suppose that in the contemplation of the parties there would be profits, that there would be something for the Government, and that the line would fulfil the reasonable expectations of the Colony; that a time would come when there would be profits, and when the guaranteed interest would be reduced. This was doubtless contemplated, and there was a provision in the contract for refunding the money. Well, the traffic on the line has increased as much or more than any of the parties to the contract had ever contemplated. I have an account in my hand which shows the profits.

THE CHIEF JUSTICE: Was that given in evidence?

THE ATTORNEY-GENERAL: It was in the Parliamentary papers put in.

THE CHIEF JUSTICE: I cannot take notice in this proceeding of anything which was not before the jury?

THE ATTORNEY-GENERAL: This paper was, I believe, put in, and Mr. Grant was examined upon it.

THE CHIEF JUSTICE: I have not a copy of it.

THE ATTORNEY-GENERAL: They are his own accounts which were put in by him, and he was examined upon them.

THE CHIEF JUSTICE: Can you refer me to it?

THE ATTORNEY-GENERAL, referring to the official report, said it was Mr. Ellis who was cross-examined upon the paper (page 23 of report.) The accounts were put in.

THE CHIEF JUSTICE: Are they marked by the clerk?

THE ASSOCIATE: I have not got the account.

THE CHIEF JUSTICE: What question was it of Mr Ellis's evidence?

THE ATTORNEY-GENERAL: Question 8.

MR. JUSTICE ADAMS: That does not show that the traffic had increased.

THE CHIEF JUSTICE: The account on which Mr. Ellis was examined was a specimen copy of the accounts which were sent in quarterly.

THE ATTORNEY-GENERAL: I am instructed these accounts were put in.

THE CHIEF JUSTICE: It is a specimen account that was put in.

THE ATTORNEY-GENERAL: I cannot be certain; I had not personally charge of the documents.

THE CHIEF JUSTICE: You will find it is not a document put in. It is one of the quarterly accounts.

THE ATTORNEY-GENERAL: We have the originals of all the accounts, and they can be sent for.

THE CHIEF JUSTICE: I only want on this occasion what came to my sight or knowledge at the trial; nothing else is admissible.

THE ATTORNEY-GENERAL quoted from the examination of Mr. Ellis at the trial.

THE CHIEF JUSTICE: Yes, but that was not on a money paper, but on one of the accounts sent in quarterly.

THE ATTORNEY-GENERAL: We put a pile of accounts into the witness's hands. They were all put in, but we did not, in cross-examination, take him through them all.

THE CHIEF JUSTICE: Mr. Miller put in one particular paper, and the witness was examined on it. I did not see any but one on which he was examined.

THE ATTORNEY-GENERAL: We had the originals, but of course we could not put in the printed copy as an original document.

THE CHIEF JUSTICE: I cannot admit any document now which was not put before the jury at the trial. It may have been put in, but I cannot charge my memory. Fortunately, we have the shorthand writers' report here, and if the document was put in it will be recorded.

THE ATTORNEY-GENERAL: I feel somewhat taken aback, but I can shape my argument in such a way as to state that the traffic has been 100 per cent. increased.

THE CHIEF JUSTICE: Oh, it may be stated in that way. I should not mind, as a matter of general interest, knowing what the increase was.

THE ATTORNEY-GENERAL: Then perhaps your Honor will allow me to use it?

THE CHIEF JUSTICE: Yes. What was the total increase in 1885?

THE ATTORNEY-GENERAL: This paper goes up to 1888. There is the bundle of original accounts up to 1886. According to the printed Parliamentary paper the traffic receipts have increased £38,000. In 1877 the total receipts were £38,743 7*s*. 8*d*., the next year they were £46,000, the next £49,700, the next £50,000, and they go on creeping up until they reach £76,000 in 1888. The receipts have, in fact, doubled.

THE CHIEF JUSTICE: Yes, the increase is very large.

THE ATTORNEY-GENERAL: It is certainly as great an increase as either party to the contract could ever have contemplated. Therefore, the state of things has arrived when it was intended by both parties that the Colony should derive some benefit, and when it should realise its expectation of the reduction of interest. But by His Honor's interpretation that is defeated, and will be so during the whole period of the continuance of the contract. During the whole period the reasonable expectation of the Colony will be defeated.

MR. JUSTICE DODDS: I think if the increase is to be considered, is it not a fact that the actual increase is nothing like what was contemplated by the original report?

THE CHIEF JUSTICE: The paper you have read from, Mr. Attorney, does not give the number of passengers, and it is for them that the increasing rolling-stock is required. If the amount of the increase is occasioned by the increased number of passengers, the rolling-stock might have to be largely increased in consequence. What I have not seen is the increase in the number of passengers. I want to see the passengers' return, because you cannot put more than a certain number into a certain number of carriages, and in this way rolling-stock becomes necessary.

THE ATTORNEY-GENERAL: It was only the pecuniary results of the increase in traffic to which I desired to draw the attention of the Court. The next aspect of the case with which I wish to deal is one referred to many times during the trial, but on which I wish to say I differ from my learned friend, Dr. Madden, altogether, and I think your Honor was with me. It is the question of partnership, *quasi* partnership. I say the Colony and the Company are not partners. They do not share profits. They never have shared profits, and it was never contemplated that they should do so.

THE CHIEF JUSTICE: I think I was with you in that view, Mr. Attorney. I don't think you can do more, unless you want to disturb the view previously held by me.

THE ATTORNEY-GENERAL: I am in the happy position of knowing that you are with me in this contention, but I desire you should go further with me if you agree with me in stating that the right to share in the profits does not constitute a partnership. Then—

THE CHIEF JUSTICE: There is no partnership.

THE ATTORNEY-GENERAL: There can be no partnership. That right to share in the profits is only a refunding of the amount of the subsidy paid in previous years. The obligation on the Government is to pay a subsidy if the line does not turn out beneficial to the Company up to a certain amount, that is, if the line fails to realise a certain amount of profit the Company is to be entitled to a subsidy; then, if there is a profit at any subsequent period during the continuance of the contract in excess of £39,000 per year, there is to be a refunding of the subsidies previously paid. Your Honor referred to the provisions made in the case of the *Seven Oaks, Maidstone, and Tunbridge Railway v. the London, Chatham, and Dover Railway Co.*, as what appeared to be proper, necessary, and usual provisions in a contract of that kind, and which your Honor said we had omitted to put in our contract. My contention is that there was no necessity for us to put in such provisions, simply because we are not partners; but if it could be shown that we are partners, then there would certainly be a hiatus in the contract. As we are not partners, the matter is not now in question.

MR. JUSTICE ADAMS: But in the case referred to they were not partners.

MR. JUSTICE DODDS: No, it was merely a subsidiary contract to work, that was all.

THE ATTORNEY-GENERAL: There was a temporary share in the profits, or a *quasi* partnership, but I say we never were partners. In the case of the Seven Oaks Railway they did share profits with the Dover Company, but we never did share profits really.

THE CHIEF JUSTICE: Yes; the Government does share the profits after a certain amount.

THE ATTORNEY-GENERAL: No; only in the nature of a refund of the subsidy.

THE CHIEF JUSTICE: But you both called that profits, and admitted your right to share after a certain amount.

THE ATTORNEY-GENERAL: Yes; but profits in this case simply means a sum of money refunded upon the subsidy paid in certain years. A particular sum is to be divided in certain events, but to be divided only for the purpose of refunding the subsidy paid.

THE CHIEF JUSTICE: Oh, I don't care to what purpose it is to be devoted. It is a share of the profits up to a certain time. The words are there in the Acts and in the contract; they are admitted by your clients and by the Company. I think it would be hard to get out of the term, "share of the profits."

THE ATTORNEY-GENERAL: But that is not profits like as between two partners.

THE CHIEF JUSTICE: You share the profits until a certain amount is paid.

THE ATTORNEY-GENERAL: Yes; but that is only the mode provided for paying a debt.

THE CHIEF JUSTICE: It is a share of the profits.

THE ATTORNEY-GENERAL: That is, it is paying a debt. If the subsidy was paid during 15 years of the period covered by the contract and during the remainder of that period a profit was made in excess of £39,000 per year, the amount of subsidy paid in the previous period becomes a debt owing in the future by the Company to the Colony, in a certain event. They would be relieved of paying it if the speculation is not sufficiently profitable. Taken in the ordinary sense, the plaintiff Company is not in any different position from any other company with which the Colony enters into a contract where the subsidy or remuneration ceases in a certain event. Take the case of the Tasmanian Steam Navigation Company, which is a company constituted similarly to this. We enter into a contract with that company for three years, instead of for thirty years, to take the mails. We subsidise them for the service. The only difference between the position of that company and the Main Line Company is that the subsidy is to be paid to the T.S.N. Company continuously for the whole of the period, without any reduction on account of any profit made by the company; no matter what the profits of the company are, it is nothing to do with us, we still have to pay the whole amount of the subsidy; but in the case of the Main Line Railway the profits have all to do with it, because as soon as the profits exceeds 6 per cent. our subsidy begins to reduce: that is the only difference between our relations with the T.S.N. Company and with the Main Line Company.

MR. JUSTICE ADAMS: But that constitutes a very great difference.

THE ATTORNEY-GENERAL: Yes, a great difference, in our favour, not in favour of the Company. I am glad Your Honor has called attention to it. The difference is in our favour. In the one case the subsidy is never reduced, but if this Company makes a certain amount of profit, then the subsidy is to be reduced.

MR. JUSTICE DODDS: Is not the fact different? In the one case you pay the T.S.N. Company £4000 for carrying the mails—that is a specific service. In the other case you make the Main Line Railway Company provide certain accommodation, and to superadd to this, that is, they are to provide for all increasing traffic, and that may take, in providing what is necessary for maintenance and working, all of the receipts of the line. That surely is a great difference.

THE ATTORNEY-GENERAL: But the T.S.N. Company has to maintain the service of steamers from both ports.

MR. JUSTICE DODDS: Have you any provision in their contract which enables you to deduct the cost of maintenance and working, whatever it may be, out of the amount of the revenue that they derive.

THE ATTORNEY-GENERAL: No; for the simple reason that we have no interest in the profits they make. It is no matter to us what profit they make out of their contract.

MR. JUSTICE DODDS: Then, don't you see there is a material difference between the two contracts. In the one case you pay a specific sum for a specific service, and there it ends; in the other case you pay a sum with certain conditions, which constitute a very material difference.

THE ATTORNEY-GENERAL: In the one case the subsidy will decrease as the profits increase; in the other it won't; and necessarily attached to that condition must be some condition as to revenue and expenditure.

MR. JUSTICE DODDS: No, that is not so. The question as to decreasing the subsidy must be common to both, and yet you are not touching what I am referring to.

THE ATTORNEY-GENERAL: I contend that where there is a decrease in the profits it must be satisfactorily shown.

MR. JUSTICE DODDS: That is different from the question as to what should be charged to maintenance and working.

THE ATTORNEY-GENERAL: His Honor the Chief Justice agreed with me so far, that the profits under this contract is the balance of receipts over expenditure after all reasonable expenses have been paid; the only difference is as to whether expenditure as charged to maintenance is to include what is usually charged to construction.

MR. JUSTICE DODDS: Quite so.

THE ATTORNEY-GENERAL: The profits being in excess of the receipts over expenditure, if the amount of the profit is to govern the amount of the subsidy, it is necessary to go into the question as to what is profit. If the subsidy is to rise or fall according to the surplus of receipts over expenditure, then it is necessary to go into the whole question of expenditure and receipts. That is the only difference between the position of this Company and the T.S.N. Company. If the subsidy is not to rise or fall it is no matter to us what the profits are, we need not look into them; but in this case the subsidy is to rise or fall according to the profits, and therefore we have a right to look into them.

MR. JUSTICE DODDS: I quite follow you; but don't you see if there were no difference between the two cases, such as I have pointed out, there could be no case before the Court at the present moment. There would be no question arising.

THE CHIEF JUSTICE: You are starting on premises that are distinct, and you must satisfy us that the contract is the same. There is a material variation in the conditions. The one Company has to maintain and work.

THE ATTORNEY-GENERAL: Yes, your Honor, my broad position is this: This Company has no other position than any other Company constituted or started, and with which the Government enters into a contract, except that there is a provision to subsidise them for services, which subsidy thus stipulated shall rise or fall according to circumstances.

THE CHIEF JUSTICE: There are no two companies in a precisely similar position, unless the contract is also similar. I take it that the contracts are about as different as contracts can be, and therefore of the one to the other is very small.

THE ATTORNEY-GENERAL: Yes; but the difference is directed to one object. I do not wish to refer to the T.S.N. Co. particularly, or to take notice of that particular contract.

THE CHIEF JUSTICE: If you take any other the course of argument must be that you take that and this and see how far they differ.

THE ATTORNEY-GENERAL: I would first say this, your Honor: the Company is in no way different in its position to any other company with which the Colony may enter into a contract, except that the subsidy paid to this Company is to rise or fall according to the profits made by the Company. That is the only difference, and the provisions of the contract are to provide a method of adjusting this rise and fall. After the 30 years are up, we, to use a vulgar expression, wash our hands clean of them—they have to stand on their own bottom. We have no more control over them than we have over any other Company existent in the country; but during those 30 years there is the contract between us that they shall render certain services for a certain subsidy, which is to vary in amount proportionately to the relation of receipts and expenditure, attendant on the maintenance and working of the undertaking. That is the sole difference between this contract and one like that made with the T.S.N. Co. when all unessential details are excluded; and that being the case, your Honor, I fall back on the expression used by Mr. Madden, that this Company has no more the right the lean upon the Government than any other company, and that we are not bound to find them capital, and that they have no right to use us as a milch cow. I say that they are in no other position than that of any other company. There is no item in the agreement creating any necessity to make such provisions as in the case of the Seven Oaks Company, quoted by your Honor, and, moreover, if the contention of the other side as to the meaning of the word "profits" be correct, there is no hiatus in the agreement, because all that is included in the condition in the case quoted is then practically included in this contract.

THE CHIEF JUSTICE: I think you might take a very much stronger ground for not requiring anything new. You have maintained that if the traffic was doubled that it was only necessary that there should be the same number of trains as the Company started with, and that, therefore, there was no provision in the contract requiring any new rolling-stock other than to replace such of the original as might be worn out.

THE ATTORNEY-GENERAL: I stand or fall by that position, your Honor.

MR. JUSTICE DODDS: That involves a great deal. What do you say regarding the refusal to provide the guaranteed interest if the traffic requirements were not fully met?

THE ATTORNEY-GENERAL: I say that that would not arise, your Honor, because it was expected that both parties would act on the principles which control any ordinary human being, and that if there was the business they would certainly provide the means of carrying that on.

THE CHIEF JUSTICE: According to that construction we have the line for 30 years, and do you contend that for the whole of that period only two trains daily each way shall be run, however much the traffic increases?

THE ATTORNEY-GENERAL: The Company as human beings would never do so, although they are not bound to provide other trains except those mentioned in the contract. It was contemplated that the contract would be undertaken by sane beings, and not men fit for New Norfolk.

MR. JUSTICE DODDS: That is, then, that you say the Company would consider it better to put on increased rolling-stock at their own expense, and whilst having at the same time to pay some of its cost back to the Government?

THE ATTORNEY-GENERAL: Not necessarily.

MR. JUSTICE DODDS: The having to pay some of it back in the guaranteed interest, whereas if they would be content with affairs as they were, they would receive this interest without any deduction, although they might abandon that increase of traffic.

THE ATTORNEY-GENERAL: And cut off their nose to vex their face.

MR. JUSTICE DODDS: The question is whether such a course would not be more prejudicial to the Colony than to the Company.

THE CHIEF JUSTICE: That is, the question would become one of whether they would not do better by not putting on this extra rolling-stock, leaving the Colony to do as best it might, after they had renewed their original stock.

THE ATTORNEY-GENERAL: That is all they are bound to do, your Honor.

THE CHIEF JUSTICE: And that is what you put as a reasonable interpretation of the contract.

THE ATTORNEY-GENERAL: That is all the contract requires of them, your Honor.

THE CHIEF JUSTICE: Under the contract they are bound to work and maintain in an efficient manner this line of railway. Now, is it—would it—be working the line in an efficient manner if they were to leave half the traffic standing by the roadside?

THE ATTORNEY-GENERAL: But they would not do so, seeing it would be to their own benefit to do otherwise.

THE CHIEF JUSTICE: Perhaps, Mr. Attorney, you would like higher authorities on that point—the authority of the Court of Exchequer. I can show it you at once. I refer to the case of *The West London Railway Company* v. *The London and North-Western Railway Company*, *C.B.*, *Vol. XI.*, *p.* 356. I do not know whether you have that before you. This was a case in which one company agreed "to work this railway efficiently, so as to secure the stipulated benefits to the plaintiffs in the share of gross proceeds, but were not compelled to work it so as to produce the largest quantity of gross proceeds." The case was taken from the Court of Queen's Bench on appeal, and the judgment of the Court of Exchequer Chamber having spoken of what the companies would do, goes on in this way:—

"If this Railway had been leased to a single individual or company without any connexion with any other railway, and leased alone, the measure of efficient working, we cannot help thinking, would be very different from what would be required from a company whose line was connected with it, who had control over their own line and were armed with a power of adding to the traffic of the railway by the control possessed over another line, and whose capabilities and powers in this respect were reasons which disposed Parliament to permit of release to be made to them."

This, of course, is only preliminary: here is the judgment:—

"It is difficult, indeed almost impossible, to define the precise nature and degree of efficient working which such a company ought to apply under this covenant; not so difficult to say that it ought to be different and greater than would be required from a company or an individual who had nothing but the railway leased. They could only be required to supply convenient accommodation and attendance for the receipt and sufficient means of carriage of such goods and passengers as might be offered at one terminus or an intermediate station to be carried to the other terminus or some other intermediate station, and this however small the gross receipts might be."

Now, that was a case in which there was an agreement to work efficiently; here we have it to work in an efficient manner. There was a sharing of profits in both cases. That is a very high authority, and that seems to me, on the words "efficient working," to give a very strong *prima facie* interpretation.

MR. RITCHIE: Would your Honor give the page of the Report you are quoting from.

THE CHIEF JUSTICE: It is p. 356, Vol. XI., *Common Bench Reports*.

THE ATTORNEY-GENERAL: I had not discovered that in my researches, but I think I shall be able to clearly distinguish it from the contract with which we are dealing in the present case. Before I leave the question of hardship to the Company I would just like to say that, with regard to your Honor's remark, it would be hard for this Company to find additional capital without getting any especial return from it, that they have been in that position throughout the greater part of their history, and that the contract contemplates that they should be in that position. Our guarantee is limited to £650,000, and we admit the line cost over a million, and they had to find additional capital, but they are not getting 5 per cent. on that. We did not contemplate finding

them 5 per cent. on that sum, and although they may have to spend it, and may only be getting 2 or 3 per cent, or even only 2½ per cent. interest for their money.

THE CHIEF JUSTICE: It would be a question of degree. If they had to spend more than this £650,000 it would then be a question of how much more they would have to spend.

THE ATTORNEY-GENERAL: I do not know if it is an omission of the reporter, but in the official report of the trial a quotation of a certain clause of the contract which occurs in the report makes your Honor say that the true meaning and intention of the clause is that the Company may at all time get 5 per cent. on the amount expended by them. In the contract the words are "limited as aforesaid," and when you put in those words the point of your Honor's question is gone. They would have got 5 per cent. if they had not been compelled to spend more than £650,000, but in the Act it was contemplated that they might spend more.

THE CHIEF JUSTICE: That was a speculation. What they have spent has been upon construction.

THE ATTORNEY-GENERAL: One witness called it "progressive construction," your Honor.

THE CHIEF JUSTICE: All that the Government was entitled to contract for was that they should maintain and work.

THE ATTORNEY-GENERAL: That closes one-half of the argument, which I may characterise as a reply to some of the questions raised by your Honor's interpretation of the contract. I now proceed to state some arguments which I may characterise as being in support of our interpretation of the contract.

MR. JUSTICE DODDS: That is on the second ground.

THE ATTORNEY-GENERAL: I have so far been replying to His Honor's summing up. I will now begin to approach the point of an independent interpretation of the contract, that is, our interpretation apart from any other person's interpretation. The first thing I desire to call attention to is Clause 6. His Honor bases his interpretation of the words "work and maintain," as used throughout the contract, upon the words following them in Clause 6, viz., "so as to afford all sufficient accommodation and due facilities for the passenger and goods traffic of every portion of the line," and I would point out that those words are not to be found in any other clause of the contract, or in any section of any of the Main Line Railway Acts, and I should like now to draw His Honor's attention to the fact that when he quoted the judgment of Sir George Jessel he said that unless he interpreted the words "maintain and work" by the words following them in this clause there would be a hiatus in the agreement.

THE CHIEF JUSTICE: You have those words there; how do you get rid of them? They are in the contract—"so as to afford sufficient accommodation." Do you strike those words out or not?

THE ATTORNEY-GENERAL: I only say that it is the only case in which they appear in the contract.

THE CHIEF JUSTICE: But is it necessary for a person to put a thing in half-a-dozen times.

THE ATTORNEY-GENERAL: I don't say that, your Honor.

THE CHIEF JUSTICE: But if they have once said this in precise and plain words, there they state a thing—"so as to afford all sufficient station accommodation and due facilities," and "to maintain and work in an efficient manner."

THE ATTORNEY-GENERAL: I only called attention to the fact that that is the only place in which they occur.

THE CHIEF JUSTICE: Must we not give the whole intention of the contract? If the words "maintain and work" are developed in any part, can we omit them? I might go so far and say I think the words "efficient working" embrace everything. I might, indeed, even use the language of Dr. Madden, and say they were redundant, and what does redundant mean but a something that is already in the contract—a superfluity?

THE ATTORNEY-GENERAL: I intend to reply to the objection raised by your Honor. It is quite in my track, but if your Honor will allow me to pick up where I left off, I say that Clause 6 is the only place in which those words occur. After quoting the judgment of Sir George Jessel, your Honor said:—

"That is the definition of maintenance, and would include certain improvements, and if the case stood there that would be my guide, but it goes on to say in the same clause of the contract, not only to 'maintain and work the said line of railway in an efficient manner,' but adds 'so as to afford all sufficient station accommodation and due facilities for the passenger and goods traffic of every portion of the line.'"

And, further on, your Honor said:—

"The question is, what do the words 'maintain and work' mean? If they stood alone I should say they meant renewals, repairs, and alterations, with improvements, if necessary, but when it goes on to say 'so as to afford sufficient accommodation and facilities for traffic,' do not the parties enlarge the meaning of the words?'"

THE CHIEF JUSTICE: There I do not think I was bold enough. I think I should have gone so far as to say the words are redundant.

THE ATTORNEY-GENERAL: I totally differ from Dr. Madden, if your Honor will permit me to say so, in relation to those words.

THE CHIEF JUSTICE: It is an unusual thing for counsel having taken up one course at a trial to take another at subsequent phases of that trial. You sat by him, yet you did not prevent his using those words; in fact you acquiesced in them at the time they were made.

THE ATTORNEY-GENERAL: Your Honor, Dr. Madden had no opportunity of arguing as to what was the interpretation of the contract.

THE CHIEF JUSTICE: He argued for some hours.

THE ATTORNEY-GENERAL: Yes, in his address to the jury; of course, your Honor, I was placed in a somewhat peculiar position in bringing an eminent Counsel like Dr. Madden over here; and having put the conduct of the case into his hands for the time, I thought it best in the interests of the Colony to allow him to put before the Court whatever seemed to him to be the proper interpretation of the contract, without interference on my part.

THE CHIEF JUSTICE: I think it is better to point out to you that it can be objected by the other side.

THE ATTORNEY-GENERAL: I do not wish to go into the matter at all unfairly, but I presume it would be open to me to say I took a mistaken view at the trial, and that it would also be quite open for Dr. Madden if he were here to say that he made a mistake, and to support what I now contend is the proper interpretation of the contract. My contention with regard to this clause 6 is that it does not impose any additional obligations on the Company beyond those imposed by the other parts of the contract and by the Main Line Railway Acts. It is not obligatory in its language, and has no obligatory effect. The object of its insertion in the contract was to limit the obligatory effect of the first paragraph of the preceding clause, in which the Governor contracts in unconditional language to pay interest at the rate of 5 per cent. per annum on the £650,000 for a period of 30 years. It might have been attached as a separate sentence to clause 5. It follows immediately, and is only a limitation of it.

THE CHIEF JUSTICE: What you contend is, that the words mean nothing different in that clause from what they mean in any other.

MR. JUSTICE DODDS asked for an explanation of the significance counsel attached to the words.

THE ATTORNEY-GENERAL: I say that their sole object is to modify the unconditional and unqualified language used in clause 5.

THE CHIEF JUSTICE: Dr. Madden says they were introduced into clause 4 of the Act, which says—"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." According to him, those words were inserted to secure the efficient maintenance and working of the railway.

THE ATTORNEY-GENERAL: I contend it does not extend the obligation of the Company any further than if the words stopped at "maintain and work."

THE CHIEF JUSTICE: I am very much of your opinion, because I think maintain and work embrace all traffic on the line.

THE ATTORNEY-GENERAL: According to the last case quoted.

THE CHIEF JUSTICE: And according to common sense, now that I have studied the contract.

THE ATTORNEY-GENERAL: I say that the obligatory clauses of the contract, so far as the contract is concerned, are those which say what the Company are to do and impose upon them the obligations to do it, and they are clauses 1 and 16. The contract would be perfect, so far as the obligations are concerned, with those clauses, and without clause 6. That is, clauses 1 and 16 would be quite sufficient and perfect so far as any obligations on the Company are concerned. Clause 1 says—"The Company shall construct, maintain, and work a Main Line of Railway 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 thereof, which construction, maintenance and working are included in the expression 'the said undertaking' herein used." I put it forward as one of the strong arguments in our case that the details of the Company's obligations are contained in the schedule. I say that, so far as the contract is concerned, it deals in general language; but when we come to the schedule we find the details of the Company's obligation set forth with a particularity that at once implies that everything was included which the Company was bound to do before the colony incurred any reciprocal obligation. The amount of train service is set out, the seating accommodation for the passengers, the minimum speed, the maximum fare, and everything possibly considered requisite to secure efficient service is there provided for in detail.

MR. JUSTICE DODDS: Is the carrying capacity provided?

THE ATTORNEY-GENERAL: Yes.

MR. JUSTICE DODDS: Where?

THE CHIEF JUSTICE: In clause 14 of the schedule.

THE ATTORNEY-GENERAL: Yes, it states there, "Such trains shall be of such capacity and shall start at such hour 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 working of the railway as well as regards the Company as the public." Under that clause they are also bound to run four trains per day.

MR. JUSTICE DODDS: "Not less than."

THE ATTORNEY-GENERAL: Not less than; and those trains may be of such capacity as the Governor may determine, and the Governor may come down and demand a train as long as the science of the day says can run safely on that line.

THE CHIEF JUSTICE: Whatever is done in that sense, you say, is in the course of maintenance and working; that is to say, all cost under the meaning of working the line in this particular way.

THE ATTORNEY-GENERAL: Yes, within the ordinary meaning of the words.

THE CHIEF JUSTICE: You argue that the words in the Schedule show that the Governor may put on extra carriages, and that the cost of maintenance and working in that sense are to come out of revenue. Now, suppose the Company refuse to put on an extra number of carriages; imagine an action brought and the declaration is that the Company covenanted to maintain and work the Line in accordance with the specified terms in the Schedule, and that they had failed to work the same. That would be the form of action; and if under it the cost of working and maintenance the cost of those extra carriages was to apply, would not the construction of the carriages also be work and maintenance under this schedule? There is nothing in this schedule to say what is not maintenance and work, therefore it would be said that they were work and maintenance under the schedule.

THE ATTORNEY-GENERAL: They must not take the cost out of profits.

THE CHIEF JUSTICE: The cost of working and maintaining them, we are agreed, comes out of revenue. Now, you say that under the covenant they may add those extra carriages. Is not that an expenditure in respect to maintenance and working?

THE ATTORNEY-GENERAL: Yes, but the first clause says that they will construct, maintain, and work according to the schedule, which includes matters of construction.

THE CHIEF JUSTICE: The construction there meant was upon £650,000. That construction is complete; but here we have got this all under maintenance and working, and if according to that schedule they provided new carriages, is not that maintaining and working according to the language of the contract itself?

THE ATTORNEY-GENERAL: That, I say, is at their own cost.

THE CHIEF JUSTICE: Has not the cost of maintenance and working to come out of revenue? and are these not costs of maintenance and working?

THE ATTORNEY-GENERAL: I think, your Honor, that I will be able to deal with that view of the question when I come to my next head. I wish now to confine myself to the question of the details of the Company's obligation as embraced in the schedule.

MR. JUSTICE DODDS: There are two views to this present argument which strike me as following out what His Honor has said. To put a case: supposing that the four trains which you contend are all that are compellable have to be added to. Now, under the contract the Governor has the power to call upon the Company to put on an extra number of carriages, if the engines are capable of carrying them, to meet the development of the traffic. Supposing it was possible that the Governor should increase the rolling-stock, say from 100 carriages to 150, where are those carriages to come from?

THE ATTORNEY-GENERAL: I say that they are to come from capital, and not from revenue.

MR. JUSTICE DODDS: Would not that be maintaining and working. Are they not bound to put on those carriages?

THE ATTORNEY-GENERAL: Yes.

MR. JUSTICE DODDS: Then, is not that a part of working and maintaining the Line within the terms of the contract? Is it not one of the things they are bound to do?

THE ATTORNEY-GENERAL: Yes.

MR. JUSTICE DODDS: Then it follows that that is part of the maintenance and working, and if that be part of the maintenance and working, it is a sum which they may clearly charge to working expenses.

THE ATTORNEY-GENERAL: No; I think there is another provision in one of the Main Line Acts which shows that was never contemplated.

MR. JUSTICE DODDS: Let us deal with the contract. I do not want to take any part in the decision, but it is most interesting to me to follow the various points, and the question has cropped up if this work and anything else which the Governor has power to call upon them to do, and which it is conceded they are bound to do, is not part of maintenance and working?

THE ATTORNEY-GENERAL: The schedule is referred to in the first clause of the contract which shows the strict meaning of the working. We admit construction for the purpose of opening the railway.

MR. JUSTICE DODDS: Is it not part of working the line?

THE ATTORNEY-GENERAL: No; I put it thus: His Honor said in course of the trial that a railway in one sense was never finished, and we contend that the Company are to provide everything in the nature of permanent additions to the undertaking at their own cost, and that the provision of such new works is not part of maintaining and working the line.

MR. JUSTICE DODDS: Notwithstanding that, this is something they are bound to do at the request of the Governor in Council.

THE ATTORNEY-GENERAL: The meaning intended is to maintain the line as it now exists; it may be necessary to add something to that, and then the word maintenance would cover both after the addition has been made. There is no doubt that as to any additional rolling-stock they may have put on they can charge the repairs and renewals of it against working expenditure. They have now invested another £100,000 capital, and henceforth they may charge the repairs and renewals of the works in which that additional capital has been expended as maintenance, and include it in expenditure. But maintenance and working cannot be considered by themselves, but must be considered with regard to something in existence. When additional carriages come into

existence, then work and maintain will apply to them, but they cannot be made to include the bringing of additional carriages into existence. They are not creative terms, nor have they power to create.

MR. JUSTICE DODDS: That is going a considerable distance, if you say they are entitled to charge repairing and maintaining additional stock; and although they may charge the buying of the stock to capital, if you state they are entitled to charge the maintenance and repairs, that is going a long way.

THE ATTORNEY-GENERAL: I am quite consistent in my argument that work and maintenance should refer to existing things.

MR. JUSTICE DODDS: It is something in existence, it is true, but it was something not in existence at the time the railway was taken over. What interpretation do you give to the words that makes you say this work is not obligatory?

THE ATTORNEY-GENERAL: The words "at least" would not enable us to compel them to run six trains.

MR. JUSTICE DODDS: Not in connection with clause 6.

THE ATTORNEY-GENERAL: You cannot extract an additional burden to be placed on the Company out of clause 6. I am contending, so far, in favour of the Company that we cannot impose an additional burden on them out of clause 6. We have no power to do so.

MR. JUSTICE DODDS: I do not see what is the use of the words "at least." What use are they in the contract?

THE ATTORNEY-GENERAL: That they shall not run less.

MR. JUSTICE DODDS: Would it not have been sufficient if they had said they shall run four trains?

THE ATTORNEY-GENERAL: You know draughtsmen very often use different language with the same purpose in view, and having the same effect.

MR. JUSTICE DODDS: Was it in the contemplation of both parties that four trains would be sufficient to maintain and develop the traffic all through the 30 years?

THE ATTORNEY-GENERAL: Both parties contracted for that, and if there were five or six trains required, the presumption is that the Company would put them on for their own advantage. It must be understood that the rates to be charged for passengers and goods are profitable rates; this railway was not to be run at losing rates.

MR. JUSTICE DODDS: Would that not be in the contemplation of parties when the words "at least" were used?

THE ATTORNEY-GENERAL: Very possibly, but very often such words are thrown in.

MR. JUSTICE DODDS: But being in, what do you say?

THE CHIEF JUSTICE: Dr. Madden says:—"It was perfectly plain that what was contemplated was the construction of a line which thereafter should be open for traffic. It did not mean any other construction; it simply meant the construction of the line as then contemplated, which was to be open for traffic within about four years from the start of the undertaking." Mr. Fooks was going to prove that the construction was finished, but Dr. Madden admitted it.

THE ATTORNEY-GENERAL: To enable them to perform their service for the time being. But the obligation of bringing the railway into existence was on the Company. They could only maintain what was brought into existence.

THE CHIEF JUSTICE: What does the contract say? It repeats the language to maintain and work, and if you were going to bring an action against the Company for failing to perform their contract, how would you form that action? How could they do the work if they did not provide the facilities?

THE ATTORNEY-GENERAL: It would be sufficient to say that they did not provide a train of sufficient capacity. We would first of all call upon them to provide the trains, and on their refusing to comply with that demand there would be a cause of action.

THE CHIEF JUSTICE: You say failing to comply with that would be the cause of action.

THE ATTORNEY-GENERAL: You would require to say that the Governor had required them. The details of the Company's obligation were all contained in the schedule, and it had been laid down (*Elphinstone on the Interpretation of Deeds, p.* 113, *rule* 27), that where a deed contains both a general, vague, or indefinite, and also an exact or particular statement of intention, the latter must prevail. The exact and particular statement was in the schedule, and not in the general terms of the clauses of the contract. It was to the schedule they went for the details of the obligation, and there were numerous cases in which schedules to deeds had been held to control and override general words in the other parts of the deeds. On this point I quote the following case:—

"A bill of sale assigned to R all the household goods and furniture of every kind and description whatsoever in the house, No. 2, Meadow-place, more particularly mentioned and set forth in an inventory or schedule of even date herewith, and given up to R on the execution thereof. At the time of the execution one chair was delivered to R in the name of the whole of the goods. The inventory did not mention all the goods in the house.—Held that no goods passed under the bill of sale except those specified in this inventory."

The Court adjourned for lunch.

AFTERNOON SITTING.

The Court re-assembled at 2·15.

THE ATTORNEY-GENERAL continued: When the Court adjourned I was referring to a class of cases which have been decided on the principle that the contents of the schedule to a document must control and override the general terms of the document itself. The principle has most frequently been acted upon in the case of bills of sale and other deeds with schedules of property, but still it has been taken far beyond cases of that sort. It has been taken to apply to cases of bills of sale, transactions in real property, powers of attorney, the interpretation of policies of insurance in regard to pirates and the dangers of the seas, and it has been applied to companies' memorandums of association. It was so applied in the case of *Ashbury Railway and Canal Co. v. Riche—Law Reports, appeal cases, vol.* 7, *p.* 653, in which the memorandum of association of a company carrying on business as mechanical engineers and Government contractors was in question. It was held that the words "general contractors" could not be taken to mean anything beyond the more specific words previously used in connection with them, and that they could not include anything not already mentioned.

THE CHIEF JUSTICE: I am quite aware of the principle, Mr. Attorney.

THE ATTORNEY-GENERAL: I would also like to refer to the other well-known rule governing the interpretation of contracts that where there are express covenants there can be no implication of other covenants on the same subject-matter. Where there is an express covenant for an important obligation you cannot imply a covenant for any further or additional obligations of the same kind. No clause can be added to the instrument by implication. I will quote a case.

THE CHIEF JUSTICE: Oh, we admit the principle without authority.

THE ATTORNEY-GENERAL: I should like to quote the words of Lord Chief Justice Denman, where he applied this principle. It was in the case of *Aspdin v. Austin*, 5, *Adolphus and Ellis, Q.B., p.* 684:—

"Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by implications; the presumption is that having expressed some they have expressed all the conditions by which they intend to be bound under the instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued during the three years, and yet neither party might have been willing to bind themselves to that effect."

And here I would interpolate that all the parties to the agreement thought that the undertaking would be profitable. Now that it is found to be unprofitable the Court will not put any interpretation on it other than that which is expressed. The Court will not seek to meet the contingency of the undertaking being unsuccessful. The Court will not try to find a covenant to cover the disappointment of the Company. Lord Denman goes on to say:—

"And it is one thing for the Court to effectuate the intention of the parties to the extent to which they may have even imperfectly expressed themselves, and another to add to the instruments all such covenants as, upon a full consideration, the Court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentionally, have omitted."

I feel it my duty to quote that judgment in this case, because there may be an unconscious tendency to make this contract fit a different condition of things from that which the parties contemplated would exist during its continuance.

THE CHIEF JUSTICE: But you really ask us to imply a new covenant, to make the Company pay, for instance, for all the new carriages that are wanted. You ask us to imply a covenant to this extent.

THE ATTORNEY-GENERAL: And of course you can refuse, as you are the sole judges as to what is in the contract. If I am wrong of course you won't follow me. The obligation on the part of the Company is to run four trains daily, and until the Governor requires them to enlarge those trains, and they refuse to do so, no cause of action in favour of the Colony can arise upon the question of inadequate train service; but we have never required the Company to put on additional carriages, and we say to them, it is at your own discretion you have put on those carriages, and you cannot charge them to us.

THE CHIEF JUSTICE: Not if they were unnecessary; but if the carriages were necessary for the purposes of the traffic, then we come back to the old question as to necessary facilities for the working of the line. If they could not supply these then the terms of the 6th Clause is but so much verbiage.

THE ATTORNEY-GENERAL: I contend that the use of the words "shall run trains" means the trains with which they started. That is where the obligatory language comes in.

THE CHIEF JUSTICE: It is a double obligation. The question is, is it confined to those four, or is it not also applicable to all other trains necessary to carry on the traffic? That is the real question.

THE ATTORNEY-GENERAL: Another way of applying the rule of interpretation stated is, that if one covenant be restricted or qualified all other covenants referring to the same subject-matter are restricted and qualified. If we find in the contract a clause with a restriction referring to maintaining and working, any other clause referring to maintaining and working would be restricted in exactly the same manner, and would not avail.

THE CHIEF JUSTICE: Is that not rather against yourself—hoisting yourself with your own

petard? If you find a certain condition in one case it shall be so in all. Can you show me a case where the rule is so restricted?

THE ATTORNEY-GENERAL: Everywhere else it is so restricted.

THE CHIEF JUSTICE: Well, don't you hoist yourself with your own petard in this case?

THE ATTORNEY-GENERAL: By the use of redundant language?

THE CHIEF JUSTICE: You refused to call it redundant now. It was otherwise at the trial of the case.

THE ATTORNEY-GENERAL: I did not use the word redundant in the same sense as it was used by my learned friend, Dr. Madden; no clause of the contract can have the effect of extending the meaning of the words in another clause of the contract so as to add another covenant to it.

THE CHIEF JUSTICE: You mean that where it is in one part restricted it must be carried out in all the other clauses of the contract.

THE ATTORNEY-GENERAL: Yes, unless it is expressly enlarged by obligatory words.

THE CHIEF JUSTICE: Yes, if it was unqualified in one clause it must be done in others in the same way.

THE ATTORNEY-GENERAL: I wish now to direct the attention of the Court to Clause 5 of the Act 34 Vict. No. 13, which says:—

"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 execution of 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."

I submit to your Honor that this covers the same ground that is covered by the words "maintain and work" as used throughout the contract. My learned friend, Mr. Fooks, went into an elaborate argument to prove that the term "works" included all additional rolling-stock required for increased traffic; but, of course, works must include stations and everything once in existence, and which might need repairs or renewal, and the language of the section distinguishes performing works from the mere effecting of repairs.

THE CHIEF JUSTICE: Do you say that the term "works" includes rolling-stock?

THE ATTORNEY-GENERAL: That is what Mr. Fooks contended. I say that the term includes all that is included in working and maintaining. Why I mention Mr. Fooks is that his contention appears to me to be the same as His Honor's. If you agree with him you say that the word "works" includes all necessary additional rolling-stock. And if this is the case, and if the language of Section 5 of 34 Vict. No. 13 is intended to cover all that is included in working and maintaining, then the Colony can call upon the Company to provide all additional rolling-stock required for increased traffic, and if they refuse to provide it then the Colony may step in and do it and charge the Company with the cost of it. I don't know where we can find the power to do it, but if your Honor's interpretation of the contract is correct we could do it, but from my standing-point I don't say that we could do it outside of this section; but if your Honor's interpretation of the contract is correct, we could do it.

MR. JUSTICE DODDS: You include carriages in the term rolling-stock?

THE ATTORNEY-GENERAL: Yes.

MR. JUSTICE DODDS: Then, have you not a power from time to time to require additional carriages under the power to determine the capacity of the trains?

THE ATTORNEY-GENERAL: Not under Clause 5 of the Act of Parliament.

MR. JUSTICE DODDS: But under the authority of Clause 6, do you not have the power in the schedule to do it?—the schedule you have been referring to?

THE ATTORNEY-GENERAL: As to the carrying capacity, do you mean?

MR. JUSTICE DODDS: Yes; do you contend that you have that power?

THE ATTORNEY-GENERAL: I do not contend that we can go and buy rolling-stock, and put it on the railway. I do not think we have the power to buy rolling-stock and charge the Company with the cost of it, or to sue them for it. Clause 6 of the contract might enable us to refuse to pay the interest if it was not supplied, but it does not empower us to buy it and put it on the line. Section 5 of 34 Vict. No. 13 does that, if it includes additional rolling-stock. And if it does, then, upon His Honor's interpretation of the contract, we get the strange result, that the cost of these things which, according to the contract, can be charged as maintenance if supplied by the Company, can be recovered from the Company at the suit of the Minister of Lands and Works if provided by the Colony in the event of the Company's default. They are to pay for it; it is to be done at their cost. If we can send it down or make them pay for it, we can sue them for it.

THE CHIEF JUSTICE: You can sue them for it. It is a section which is difficult to be understood. The Governor may sue for it and recover the money. That is how it comes round.

THE ATTORNEY-GENERAL: If it is so unintelligible, such a jumble of words, I can only do the best I can with it.

THE CHIEF JUSTICE: To test your argument I apply the rule as to new rolling-stock to repairing. You can put new carriages on, and then recover the money from the Company. If the Government want repairs they may make them and recover the money from the Company. If that

applies to repairs, or the amount comes out of expenses, don't you see the argument is the same when applied to carriages.

THE ATTORNEY-GENERAL: If my argument is sound, that would produce an extraordinary result, but the burden lies with the Court to make an interpretation that will make it workable.

THE CHIEF JUSTICE: Is it not extraordinary that when you can take repairing out of the hands of the Company you can not do the other. Would it not be the same with the rolling-stock? It will all come in working and maintenance. Is not that the argument on either side?

THE ATTORNEY-GENERAL: If the other side can show it is so, then it will be for their benefit.

THE CHIEF JUSTICE: You are instancing that both can be sued for. In both cases the cost would come out of the profits of the Company. In both cases the cost would come out of current expenditure.

THE ATTORNEY-GENERAL: But it is to be at the cost of the Company. I don't shrink from the inconsistent result of the other point, for if it is shown that repairs are to be treated in that way it would be the duty of the Court to make the language agree. They have authority to disregard certain words in a document when they cannot be reconciled with others in it, and I put the Court in that position. The Court will not, I am sure, shrink from doing its duty in the matter. If my contention is right the Colony will benefit by the default of the Company. If they do it they can charge it out of revenue, and if the Colony does it they can sue the Company for it and recover.

THE CHIEF JUSTICE: But cannot they take it out of their revenue?

THE ATTORNEY-GENERAL: Yes, if you interpret it that way.

THE CHIEF JUSTICE: If they had to do the repairs, would the Colony not apply to pay the costs of the repairs out of the receipts?

THE ATTORNEY-GENERAL: I say not under this clause.

THE CHIEF JUSTICE: Oh, Mr. Attorney! how could the Government do it unless there was an obligation on the Company to do it? The Government could not come in unless there was an obligation on the part of the Company. If they did it themselves they would include it in their accounts as a charge for working expenses. Does it make any difference if it is done by the Government?

THE ATTORNEY-GENERAL: It ought not to.

MR. JUSTICE DODDS: The Government can only do what the Company is bound to do. It is just on the same footing. If the Company is entitled to increase its rolling-stock and did so, and charged it to construction and maintenance, the Government could only do the same thing.

THE ATTORNEY-GENERAL: Quite so.

THE CHIEF JUSTICE: Then we come back to the same point; the Government would do it, and the Company would pay for it, and charge it to working expenses.

THE ATTORNEY-GENERAL: It seems they could not in a case where they have committed default.

MR. JUSTICE DODDS: Why not?

THE ATTORNEY-GENERAL: Because the law says so. The amount can be recovered from the Company.

MR. JUSTICE DODDS: Yes, it can be recovered from the Company, but the Company would bring it in their expenditure as damages recovered by the Government, and it would be charged to expenditure, the same as if they had done it themselves.

THE ATTORNEY-GENERAL: That is a peculiar way of doing it.

THE CHIEF JUSTICE: Would there not be a sufficient reason for bringing it into their accounts? There is a bridge wants repair or a drain to be renewed, the Company won't do it, and the Government do it themselves, and the Company pay for it and charge it. Then the Government says, you must not charge that because it is not maintenance and working.

THE ATTORNEY-GENERAL: If it is maintenance and repairs only, that is included.

MR. JUSTICE DODDS: The position would be the same in any case.

THE ATTORNEY-GENERAL: No, you have to give a violent interpretation to the clause if you put it in that way.

MR. JUSTICE DODDS: The Government can only do what the Company is bound to do. It makes no difference whether it is as you put it, as to whether the Company pay it.

THE ATTORNEY-GENERAL: It is a very violent interpretation. I contend that the word "works" cannot include rolling-stock. The word "works," as I understand it, would include bridges, tunnels, stations, and so forth. The word "works" all through the Acts means bridges, buildings, fences, &c., and not carriages or locomotives. Yet when we come to section 5, we are asked to give a different interpretation to it, and to make it include locomotives.

THE CHIEF JUSTICE: You need not include it unless you like.

THE ATTORNEY-GENERAL: It is only by doing violence to the word "works" that you can make it include locomotives.* But I leave the argument on this point as I have put it before the Court. If it is not thought to be of value by the Court, it will probably not fare worse than many other arguments that have been submitted to it. Now, Your Honor, my last argument is, I think, one that deserves the serious attention of the Court, although, perhaps, it may afterwards prove to be a very empty one. It is this, that the contract is entered into by both parties in pursuance of the Main Line Railway Acts, and they are bound by the provisions of these Acts. These Acts constitute

* NOTE.—I find that I have not stated clearly what I intended to assert at this stage of my argument. What I meant to assert was that there is a distinction made in Section 5 of 34 Vict. No. 13 between "repairs" and "works," and that while "repairs" would include the maintenance of the rolling-stock which the Company are bound to provide, the word "works" referred to such things as buildings, bridges, fences, &c.—A. INGLIS CLARK.

and are the Company's charter in the same sense as are their Articles of Association. Beyond these they could not go, and when both parties, if I may be permitted to use the metaphor, sat down to draw up this contract, they had before them these Acts of Parliament. These mapped out how far they could go, for we know the Acts provided for every detail likely to be necessary in the contract. The Act 34 Vict. No. 13 provides that the contract shall include all the things set forth in the twelve sub-sections of Section 3, providing for the gauge of railway, weight of rails, and, in fact, every question that could arise in a contract of this nature. There was their charter, and they were obliged to adhere tightly to it, and not go beyond it, and therefore could not use the words "work and maintain" in any other sense than they were used in the Acts. The Acts were drafted and passed by the Parliament before the contract was drawn, before it ever saw daylight, or had an existence. The words had a meaning in those Acts of Parliament before the contract was made, and to draw up a contract giving any other meaning to those words than that they had in the Acts was beyond the power of the parties.

THE CHIEF JUSTICE: You say, then, that the words in clause 6 are *ultra vires* to the Act.

THE ATTORNEY-GENERAL: I do not say that at the present stage of the argument. I say that the Court will fight strenuously to avoid any interpretation which would charge the parties with acting *ultra vires*; and if Clause 6 is *ultra vires* it must be ignored. The argument I am now using, your Honor, has been admitted *in toto* by the other side; in fact, has been used by Mr. Ritchie for his own case. I only discovered this two days ago in taking a last look through the official Report to see if I had omitted any point that would strengthen my case. I had already formulated my own argument on this point, and I then found Mr. Ritchie had used the same argument in his written paper, which concludes with these words—it appears on page 109 of the Report—

"Any construction of the contract which shall be repugnant to the express provisions of the Enabling Acts would be *ultra vires* and cannot be permitted.

"The Act and contract are to be read together, Article 10 of contract, and if any divergence, the Act, not the contract, must prevail."

I support every word of that—I take Mr. Ritchie upon that ground most willingly. I support his argument as far as this branch of it is concerned. You cannot give to the words "maintain and work" as used in the enabling Acts any other meaning than Sir George Jessel has given to them in the case of the Seven Oaks Railway Company, and they cannot be made to mean any more in any part of the contract. They stand without any amplificatory context in the enabling Acts. The case your Honor lately quoted, I suppose, is a much older case than Sir George Jessel's judgment, and is different, as I said at the time, from this case, because the general words, "in an efficient manner," had no such schedule as that which is attached to the contract in this case.

THE CHIEF JUSTICE: You say that it must be maintained and worked in an efficient manner. It is not that it may, but that it shall be, irrespective of any schedule or anything else, and you find the words "all reasonable accommodation."

THE ATTORNEY-GENERAL: I maintain that those words, before the contract saw the light, could not mean any more in the enabling Acts than Sir George Jessel said they meant in the case of the Seven Oaks Railway Company.

THE CHIEF JUSTICE: Then the Governor was only entitled to contract for the maintaining. Section 2 of the Act says:—

"Such person or company shall continue to work and maintain the said line in an efficient manner during the said period."

Therefore the Governor could only contract to maintain and work the line after it was once open, and the Company was bound to do so—to maintain and continue to work the line in an efficient manner during the whole of that time. The Governor is only empowered to do that. All that he is entitled to do is that, and it gives the contract this effect, that if new carriages or engines are placed upon the line, as they may be, that must be an *ultra vires* action unless the doing so comes under the head to maintain and work. The only thing the Company can do is to maintain and work. The only thing the Company can do is to maintain the work, and everything that is to be done by one side or the other is to maintain and work, and if this is so, anything aside from this must be *ultra vires*.

THE ATTORNEY-GENERAL: I say, if you cannot extract it from the language of the Act, it is *ultra vires*.

THE CHIEF JUSTICE: Then that would apply to anything that is suggessted other than the carrying on of the railway, and therefore you maintain that the efficient working of the railway is not the adding of extra carriages.

THE ATTORNEY-GENERAL: Yes. I do not shrink from it, because I say that the contract was drawn on the belief that it would be carried out by reasonable beings and not by any men who were fit only for New Norfolk. This railway, when it was designed, was not one that was to be run on unprofitable lines, neither was it to be run on extraordinary ones. It must be on the same lines as any ordinary speculation.

THE CHIEF JUSTICE: Of course, Mr. Attorney, we have different views of lunatics. You must not take it up that the other side are lunatics, for I certainly do not think that a company of sane men would be willing that the profit of the line, the whole of the profit, should go to the Government till this £32,500 was paid off; for at that rate there would never be a profit.

THE ATTORNEY-GENERAL: Yes, there would be, your Honor, for we say if you do not make it for yourselves we will make it for you.

THE CHIEF JUSTICE: And in order to make it they have to make new stations and buildings and get it.

THE ATTORNEY-GENERAL: Put it at the very worst, your Honor. If they have made an unprofitable contract it is not our look-out. They go into it with their eyes wide open. Really, I think, that justifies me in referring again to the judgment in the case of *Aspdin v. Austin*. Here it was held that—

"Where parties had entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications, the presumption is that having expressed some they have expressed all the conditions by which they intend to be carried by that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued during the three years, and yet neither party might have been willing to bind themselves to that effect, and it is one thing for the Court to effectuate the intention of the parties to the extent to which they may have imperfectly expressed themselves, and another to add to the instrument all such covenants as upon a full understanding the Court may deem fitting for completing the intentions of the parties, but which they have rather purposely or unintentionally omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorised as well as liable to great practical injustice in the application."

If the parties to this contract have omitted anything, and made a contract which, when strictly interpreted, produces unforeseen results, according to this authority they must be accepted. We cannot put in anything to make it better, even for the benefit of both parties, and much as we may regret it.

MR. JUSTICE DODDS: Your contention is this—that the whole that the Company is bound to do is to provide a train service that could be carried on with the equipment as it was taken over by the Government.

THE ATTORNEY-GENERAL: Yes.

MR. JUSTICE DODDS: Very well. And you say as to providing for the business of any future time it was considered that the Company would give this as reasonable beings, in view of the increase of traffic, and consequent increase of receipts—in fact, that they would do it for their own selves.

THE ATTORNEY-GENERAL: Quite so.

MR. JUSTICE DODDS: Then, whatever they earned by so doing would go as a reduction of the subsidy.

THE ATTORNEY-GENERAL: Yes. Because the whole meaning of the contract is that we guarantee you an income of £32,500 per annum for 30 years.

MR. JUSTICE DODDS: Mr. Attorney, the words you are now using means that they would have to expend the margin of capital in the acquisition of rolling-stock to meet traffic requirements, but the only return they are to get for that is a prospect of a return after they have paid off this £32,500.

THE ATTORNEY-GENERAL: They do not pay it off.

MR. JUSTICE DODDS: Yes. Because the whole of the receipts have to go in reduction of that before they can take it.

THE ATTORNEY-GENERAL: I do not know if I am quite understood. If they make the £32,500 they put it in their pockets, and the Government does not have to put its hand into its pocket.

MR. JUSTICE DODDS: But your own argument is that they have to provide four trains, and four trains only, daily. Now if they go on and spend another million of money in order to enable them to earn the £32,500, they can never be any the better for it, because, although they do earn it by an increase of the receipts, they would lose it in the form of the reduction of guaranteed interest. They would be in no better position if they spent a large sum of money than if they remained as they started and just took the Government's £32,500 a year.

THE ATTORNEY-GENERAL: Is your Honor justified in supposing a set of circumstances which I consider to be impossible?

MR. JUSTICE DODDS: I do not put it in that way.

THE ATTORNEY-GENERAL: It could never have been contemplated by the parties that, at proper rates for conveyance and carriage of passengers and goods, it would ever be possible to spend a million or half a million of money for nothing, but it is a different thing to pay this to earn, say, £200,000. If a company were called upon to spend £1,000,000, or if say £500,000, to earn £32,000, it might be a hardship; but there is no hardship in spending half a million to earn £100,000 or more.

MR. JUSTICE DODDS: I put it to you, suppose they were called on to spend £500—why should a company be called on to spend money if they make no profit?

THE ATTORNEY-GENERAL: They are not obliged to. They are not called upon to spend it.

MR. JUSTICE DODDS: But I cannot understand what benefit they gain, and it is a question whether they would not be unreasonable beings if they did spend it if they would get no return.

THE ATTORNEY-GENERAL: But they need not spend it if they could not get a return.

MR. JUSTICE DODDS: But do you not see they could not get a return because the money would go in reduction of the interest, and it is only when they have wiped off this that they take anything themselves.

THE ATTORNEY-GENERAL: They are never called upon to wipe off anything, because they are in this happy position, that they have someone at the back of them to find this £32,500 per for them. Whatever profits they make they keep them, and never share them with the Colony unless they exceed £39,000 per year, and then they share the excess to repay the subsidies of previous years.

MR. JUSTICE DODDS: Certainly, but that is not the point.

THE ATTORNEY-GENERAL: I put it differently, Your Honor. We ought not to give to the contract an interpretation that would induce the Company to swell their working expenses and compel the Colony to raise a most difficult and complicated question for settlement here or elsewhere to protect itself.

MR. JUSTICE DODDS: We cannot look at the consequences.

THE ATTORNEY-GENERAL: Your Honor must look at the consequences.

MR. JUSTICE DODDS: Will you repeat that argument in reference to the provision of additional rolling-stock in a year in which no profits are made?

THE ATTORNEY-GENERAL: In a year in which——

MR. JUSTICE DODDS: As I have it on my notes I will just read them: In any year in which the receipts and expenditure are equal.

THE ATTORNEY-GENERAL: Yes.

MR. JUSTICE DODDS: And the Company is called upon to spend £10,000 on additional new works that you reduce in that year the guaranteed subsidy they receive to £22,500.

THE ATTORNEY-GENERAL: It would not reduce the subsidy, but they would have that much less to divide amongst their shareholders.

MR. JUSTICE DODDS: Just so. Now, another case you put was, that if the traffic receipts in another year, say, had increased by the sum of £10,000, say, to £42,000, and they had spent the additional £10,000, they would be in the same position.

THE ATTORNEY-GENERAL: But you have this intermediary case, in which they make £32,500, and require to spend £10,000 in rolling-stock, and they spend it and get £10,000 from the Colony to recoup them for that outlay. In the year in which they made £42,500 they get no subsidy from the Government, and if they still have to spend £10,000 they are in the same position as when the total receipt only gave them £32,500.

MR. JUSTICE DODDS: That is on the assumption that the working expenses do not exceed the receipts.

THE ATTORNEY-GENERAL: I am only dealing with the question of a surplus.

MR. JUSTICE DODDS: Oh, you are dealing with a surplus.

THE CHIEF JUSTICE: You put it that the receipts and expenditure are equal.

THE ATTORNEY-GENERAL: I have given several cases. I say that such is the case in my reply dealing with the argument of His Honor on the question of hardship, and I point out that though this hardship may occur the contract fails to relieve them when the receipts and expenditure balance.

THE CHIEF JUSTICE: If you are dealing with a surplus it is a different thing altogether from the other.

THE ATTORNEY-GENERAL: Oh, yes! it is a surplus. I think that concludes my argument on the subject of misdirection.

THE CHIEF JUSTICE: It seems to me that the only thing is whether the Company is bound simply to work the traffic with the same equipment it started with, or whether it is bound to provide additional equipment.

THE ATTORNEY-GENERAL: That is all we can compel them to do under the contract.

THE CHIEF JUSTICE: It seems to me that if they are bound to put on increased rolling-stock, engines, and provide increased station accommodation for the public, then there would be no substantial difference in the construction of the contract between us. You say that contract does not bind them to do more than to maintain and work, and that there is nothing new to be put on.

THE ATTORNEY-GENERAL: I go further, and say the Colony never contemplated that the Company should give such a service as should do away with the necessity for the Colony's ever having to provide any additional service for itself.

THE CHIEF JUSTICE: Then you say all it is bound to do is to work and maintain, and if it requires extra station accommodation it can only come from revenue. Thus one side of your contention is that they are not bound to put anything more on than they had on the line at starting, but that they are bound to keep it in repair, and to work it precisely as they started.

THE ATTORNEY-GENERAL: That is my primary contention. I go further, and say that the clause which enables the Governor to decide on the size of the trains cannot extend the application of the words "maintain and work" to something which is not in existence.

THE CHIEF JUSTICE: Then they are *ultra vires*.

THE ATTORNEY-GENERAL: You cannot maintain a thing which is not in existence. Neither can you—

THE CHIEF JUSTICE: Then it is *ultra vires*, because the Act reads "maintain and work."

THE ATTORNEY-GENERAL: Then, if it is so, I must submit to it, your Honor.

MR. JUSTICE DODDS: The subsidiary branches of your argument rests on this one contention, that the Colony has only a right to expect the working of the service it took over.

THE ATTORNEY-GENERAL: I say, whatever you may extract from the schedule they are bound to do; and in regard to that part of the schedule that talks about the Governor determining the

capacity of the trains, if it does empower the Governor to call upon the Company to provide more rolling-stock, then the word "maintain" does not apply until the stock is there.

THE CHIEF JUSTICE: What portion of the Act compels you to find new carriages?

THE ATTORNEY-GENERAL: I do not know that there is any. I believe there is a difficulty in Clause 5.

MR. JUSTICE DODDS: If you confine to the strict interpretation of clause 5, to "maintain and work" only that which is in existence, it must, of necessity, exclude that in the schedule.

THE ATTORNEY-GENERAL: I say that the clause in the schedule does not mean more than the words "maintain and work" mean in the Act.

MR. JUSTICE DODDS: If you confine it to that, then that creates a difficulty as regards the schedule.

THE ATTORNEY-GENERAL: If the schedule is inconsistent, it must go.

THE CHIEF JUSTICE: I do not see how you can reconcile the schedule and the Act together.

THE ATTORNEY-GENERAL: Of course I stand upon the Acts of Parliament, and say you cannot go beyond them. In regard to clause 5, I consider it is only by a violent extension of the meaning of the word "works" that you can include additional rolling-stock in it. The terms used in the Act refer to roads and bridges, &c.

MR. JUSTICE DODDS: That was quite consistent with the argument you took up this morning, that the Company were not to go beyond the number of trains stated.

THE ATTORNEY-GENERAL: If they give any other, such as a suburban service, they must do it at their own expense; they are entitled, if they chose to keep separate books, and keep the profits to themselves. We have nothing to do with that service.

THE CHIEF JUSTICE: There is another difficulty. Did not a subsequent Act recognise this contract as faulty, and therefore to be set aside? And did not the language to "maintain and work" include the putting on of extra carriages?

THE ATTORNEY-GENERAL: I am thankful for that particular suggestion, because Mr. Lovett, in his evidence, proved that for the first 10 years the Company maintained according to our construction of the contract. On the second branch of my argument, as being against the weight of evidence, I presume the Court will agree with me that if our contention as to the interpretation of the contract is right, the balance of the expert evidence was largely in our favour.

THE CHIEF JUSTICE: We do not look upon the evidence as affecting the case; both counsel repudiated it, and in summing up I repudiated it. It is solely a question of construction, and really whether my construction was right, and that they should do all that is reasonably necessary. Now you contend that the Company were only bound to work the Railway as it was started. Of course the contention is perfectly new, and was not propounded at the trial.

THE ATTORNEY-GENERAL: I admit that; and allow me to make a personal explanation. When we employed Dr. Madden, a gentleman of such wide reputation at the Australian Bar, we allowed him to take his own course; but in his absence it is my duty to do the best I can as the case presents itself to me, and I know in some points I have differed from that gentleman. I need not trouble the Court, then, on the question as being against the weight of evidence, because if our interpretation is correct, I think his Honor will admit that the balance of the expert evidence was entirely in our favour as to what was the ordinary meaning of maintaining.

THE CHIEF JUSTICE: We have nothing to do with the balance of evidence. All that was left to be asked was what was reasonably necessary—whether all those works were reasonably necessary for the due efficient working of the Main Line, and the jury found their verdict. There is no question if the weight of evidence can arise in the issue.

THE ATTORNEY-GENERAL: Of course the verdict was given alternatively.

THE CHIEF JUSTICE: As long as the present verdict stands the alternative is nothing.

THE ATTORNEY-GENERAL: But I may point out the inconsistency of the findings. They have put the items stores Hobart, porch and gatekeepers' lodges on one side, and on the other covering of an engine shed and the rolling-stock.

THE CHIEF JUSTICE: I quite agree with you in what you say as to the estimate of the damages from the Colony's point of view. I think there is a strong case there that the finding was against the weight of evidence; in fact I do not think as far as the new rolling-stock was concerned that it wonld stand. At the same time that question cannot arise until the first verdict is got rid of. I think upon my own view that the jury were in error as to the amount they found under that second verdict; that was my opinion, and the opinion of the Judge who tried the case is sometimes considered worth something.

THE ATTORNEY-GENERAL: It only remains for me now to move for the rule.

THE CHIEF JUSTICE: You do not ask that, but I presume you would prefer a new trial?

THE ATTORNEY-GENERAL: I would prefer a new trial in the circumstances. If the jury had found a consistent verdict my application would be to set aside the present verdict and enter this alternative one. If the jury had found on the one side for the Government and on the other side for the Company, I would have moved in that direction, but the jury have put us in such a peculiar position that I have to ask for a new trial.

THE CHIEF JUSTICE: I do not know how they come to put in new rolling-stock in place of renewals and improvements.

THE ATTORNEY-GENERAL: And they put gatekeepers' cottages on the other side.

THE CHIEF JUSTICE: It is very difficult to say how it was arrived at; but I do not consider it is satisfactory as an alternative. But we need not consider it, because you ask for a new trial.

THE ATTORNEY-GENERAL: Yes.

THE CHIEF JUSTICE: I should like to have an opportunity, before I decide, to think over the arguments; and I am very much indebted to you, Mr. Attorney, for the trouble you have taken in the matter, and the force with which you have put your views before me. I have had the advantage of hearing Mr. Fooks and Mr. Miller, and I do not think that you have failed to exhaust the arguments on your side. I see Mr. M'Intyre sitting next you, and I am sure that there has been an amount of labour and trouble imposed upon counsel in presenting the case so ably before the Court. I will be able to say whether I grant the rule probably on Friday, and if I should not grant the rule, I will take a little time before I put my judgment on paper.

The Court then adjourned.

FRIDAY, 12TH JULY, 1889.

THE CHIEF JUSTICE, in delivering judgment, said:

This is a motion for a new trial on the ground of misdirection. The case was heard before me at the last Civil Sittings, when Mr. Fooks, Q.C. (of England), Mr. Byron Miller, and Mr. Ritchie appeared for the suppliants, and the Attorney-General, Dr. Madden (specially retained from the Melbourne bar), and Mr. M'Intyre represented the Crown. The supplication sets out a contract between the Governor of this Colony and the Company, by which the Company contracts to construct, maintain, and work a main line of railway between Hobart and Launceston, and the Governor guarantees interest at the rate of £5 per cent. per annum upon the money actually expended in the construction of the railway up to and not exceeding £650,000, for a period of 30 years from the opening of the line for traffic; the supplication then avers that the line was duly constructed and opened for traffic, and that the Company has ever since maintained and worked the line, and then the Company assigns, as the breach of contract, the non-payment of a large sum of guaranteed interest. The Crown pleaded several pleas, but the third was added by consent in order to directly raise on the face of the pleadings the real question in issue. This plea states that during the period for which it is in the supplication alleged that Her Majesty did not pay a large portion of interest, profits were made by the said Company, and that such profits were by the said deed agreed to be taken and received by the said Company in reduction of the said interest, and the plea then avers that, except as to the amount of profits so made and received by the Company, the Crown had paid and satisfied all interest due and payable under the said deed. The contract is made in pursuance of the Acts of the Parliament of Tasmania, 33 Vict. No. 1, and 34 Vict. No. 13, by deed dated 15th August, 1871, between the Governor, with the advice of the Executive Council of the one part, and the Main Line Railway Co., Limited, of the other part. The contract so made was varied by the subsequent Act 46 Vict. No. 43. These three Acts and the contract constitute the contractual documents between the parties, and form the foundation of their respective rights and liabilities so far as the present case is concerned. By clause 8 of the contract, after the line is opened the Company is to furnish quarterly abstracts of their receipts and expenditure, and the Colony is bound to pay, within 14 days after the delivery of the abstracts, such sum as will, with the profits, 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 railway and works might cost. The difference between the parties is as to the amount of profits. To ascertain the profits, it is necessary first to find the amount of revenue, and next the expenditure for the maintenance and working of the line, and any balance that remains, after deducting such expenditure from the revenue, represents the profits. The amount of revenue is admitted, and the amount actually expended by the Company is not questioned, but the Crown contended that part of this expenditure ought not to have been charged to maintenance and working expenses, and so could not be charged at all under the contract in reducing the profits. The part of the expenditure that is in dispute was reduced, before and at the trial, to eight items only—viz., in the year 1883—

	£	s.	d.
1. Hobart, erection of store and alteration of original store to form continuation of carpenters' shop	306	8	2
2. Hobart, building chimney stack and foundation for brass furnace, &c.	721	13	5
3. Hobart, porch in front of station	91	13	11
4. Gatekeepers' lodges	136	14	11
5. Rolling-stock	3827	18	8
TOTAL	5084	9	1
And in the year 1884—			
6. Gatekeepers' lodges	52	10	0
7. Rolling-stock	8087	18	4
8. Remuneration to trustees	472	10	0
TOTAL	8612	18	4

Thus, the total of the items in dispute amounts to £13,697 7*s.* 5*d.* The jury found in favour of the Company for the sum of £13,224 17*s.* 5*d.* and interest, being the amount claimed less the sum of £472 10*s.* for item 8, as to which the jury found that it was not a legitimate expenditure arising

out of the contract. Omitting item 8, the Crown's contention was that the other seven items were not expenditure in maintaining and working the line, but were items of construction, and should be carried to a separate capital account to be provided by the Company, and could not be charged against the revenue in reduction of the profits. On the other hand, the Company claimed to charge these seven items to expenditure in maintaining and working the line, and that, therefore, they were entitled to deduct them from the revenue in arriving at profits. This was the issue between the Company and the Crown. It was admitted at the trial by the Crown that the Railway was constructed at a cost exceeding £650,000, and opened for traffic in November, 1876, in accordance with the contract. Upon the Company proceeding to produce witnesses to prove that, in consequence of the increased traffic on the line, the works and rolling-stock comprised in the seven items in dispute were necessary, Dr. Madden interposed and admitted that they were necessary. The Counsel on both sides maintained that the "construction" referred to in the Acts and contract is the original construction, on the cost of which, up to £650,000, interest was guaranteed, and which construction ceased on the through line being opened for traffic. As a fact, differences arose as to construction, route, &c., but these were finally compromised by the Acts 42 Vict. No. 5, and 46 Vict. No. 43, so that any course of dealing between the parties before the latter Act in 1882 is of little value. The evidence of the experts appear to me to be irrelevant when the real issue between the parties came to be developed, and the case turned upon the admissions made, and the construction of the Acts and contract. In summing up, I stated that my comments on the contract would be rather a discussion for the counsel than for the jury. I then defined "*profits*" in the language of the 5th section of 46 Vict. No. 43, as the surplus, if any, of the revenue after deducting from it "*the expenditure for and in respect of the maintenance and working of the Railway*," and in this definition the Attorney-General, in moving for a rule, expressed his concurrence. I then expressed my opinion that, under the contract, as the traffic increased the Company was bound to provide extra rolling-stock, &c., to meet the exigencies of such increase, and lastly, *as to the cost of it*, that the supply of this extra rolling-stock, &c. was included in "*maintaining and working*" by the parties themselves in the language used by them, and I directed the jury that the words "*maintaining and working*" in the contract (the expenditure on which I had pointed out was to be deducted from the revenue of the line) did not embrace simply making renewals and repairs, as was contended for by the Crown, but that "*they embraced whatever was necessary—reasonably necessary—to afford all sufficient station accommodation and due facilities for passenger and goods traffic of every portion of the line.*" I adopted these words as being the language of the contract itself in clause 6, and as being in my opinion a reasonable interpretation of the words "maintain and work in an efficient manner," and the question that went to the jury was whether the seven items were reasonable and proper expenditure so as to "afford all sufficient station accommodation and due facilities for the passenger and goods traffic on every portion of the line." Counsel for the Crown having already admitted that they were necessary to supply the exigencies of increased traffic, I need not have left any question as to the seven items to the jury, but have directed a verdict for the Company. I, however, left the question to the jury, and also a question on item 8. I also asked the jury to find the amount that would be due to the Colony on its construction of the contract—viz., that to "maintain and work" included only "repairs and renewals with ordinary improvements made in the course of alterations," and not additional and new rolling-stock, &c., so that if my construction was wrong the expenses of a new trial might be avoided, reserving leave to move to enter a verdict for the amount so found. The jury found for the Company that the seven items were reasonable expenditure for the purposes named, and against the Company as to item 8 for the remuneration of trustees, and then they found, as I requested them, the amount due in their judgment on the Crown's construction. No exception was taken to my direction, but I am clear that there would have been had I not put the Crown's case, with leave to move. I think it right that the Crown should now stand in the same position as if it had excepted on the question at issue between the Crown and the Company—viz., whether the Company being bound, as was contended on both sides, to provide such new and additional stock, &c., as the increase in traffic might from time to time require, the Company was to be at liberty to pay for it out of revenue. The Attorney-General does not now move to enter a verdict for the alternative amount, found by the jury to be due on the Crown's construction, because he is of opinion that the jury included in it items that were new and additional, and not mere repairs and renewals, and in this I concur with him. He moves on the ground of misdirection. In a lenghty argument he first pointed out what he considered were the difficulties and inconsistencies that would arise from my direction as to the meaning of the words *maintain and work*, as used in the contract, and then at last confined himself to the contention that the Company was only bound to maintain and work the line precisely as it was constructed and equipped when it was first opened for traffic, or as he admitted, when it was put to him, that although traffic increased so much, that the line, as originally equipped, would not carry one-half the passengers or goods tendered for transit between the stations on the line, the Company was not bound to supply means of transit for such traffic. In other words, the Company would be entitled to the bonus of £32,500 a year during the 30 years if they ran two trains daily between each terminus (for the contract requires at least two trains to be run daily each way) with the same quantity of rolling-stock they opened with in 1876. This, he contended, was the true construction of the contract, and if it be so I certainly misinterpreted it at the trial. But this construction is in direct opposition to the contention of Dr. Madden, who virtually conducted the case for the Crown at the trial. There Dr. Madden, whilst opening the case for the Crown, entered at length into the interpretation of the contract,

prefacing what he said by stating that "the remarks he was going to make were really intended for His Honor." Dr. Madden presented the case for the Crown in the following aspect. He said (I quote from the report of the case published by the Crown, which in this is, I think, substantially correct), "Section 6 of the contract was a prohibitory clause. It 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 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. . . . . His Honor would, he thought, see that all this was cutting them down and enforcing their obligations, and the language was redundant, in that it took Section 4 of the Act that he alluded to—viz., "the contract shall contain all such other stipulations and provisions as the Governor in Council may think necessary to secure the efficient working and maintenance of the said railway." To maintain in an efficient manner was to maintain the railway as it reasonably must be maintained, and therefore to carry that further and to provide for all, that was a mere redundancy of language. . . . . Section 6 (of the contract) threw a great deal of light upon what was intended to be meant by the words "maintain and work," and these were words for the jury to decide thereafter as to their meaning . . . . . The words were that the Company were bound to do so and so. After giving an illustration of what he contended, Dr. Madden added, "the same thing applied to municipal works. The men who undertook to do those works must do them under the maintenance clause, and would have to find the money. Government might just as well undertake to do the work themselves. He apprehended that the legal and ordinary meaning was that the Company should do the work at their own cost, and that was beyond contention." The Crown thus insisted that the Company was bound to do all that increased traffic demands, and the Company from the first admitted that it was so. Dr. Madden contended that whilst to *maintain and work in an efficient manner* bound the Company to supply whatever additional works increased traffic required, yet that the original cost of such supply must be at the expense of the Company, whilst the ordinary costs of maintenance and working only would come out of revenue. But the weakness of this position has apparently been recognised by the Crown, for if the additional works come under the head of maintaining and working, as is virtually admitted by his contention, then their cost is chargeable against revenue, for all expenditure in respect of maintenance and working is to come out of revenue (46 Vict. No. 43, sec. 5.) I am therefore not surprised that the Attorney-General did not attempt to argue the case upon the aspect in which it was presented at the trial. That the position taken up by the Crown at the trial is unmaintainable is still more clearly demonstrated by reference to the Acts of Parliament. Section 1 of 34 Vict. No. 13 empowered the Governor to contract with any person or company for the construction, *maintenance, and working* of a Main Line of Railway in consideration of the Governor guaranteeing to such person or company interest at the rate of £5 per cent. per annum on any sum of money, not exceeding in the whole £650,000, which the said Company or person might actually expend in the construction of the said Main Line of Railway. Section 2 provides that "such guarantee shall continue for 30 years from the date at which the said line is 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." The Act therefore empowers the Governor to contract only for the construction, which is long since completed, and for the maintenace and working of the railway, and the second section secures the guaranteed interest to the Company for 30 years, provided it continues to *maintain and work the line in an efficient manner during that period.* All, then, that the Governor was empowered to contract for (after construction) was *maintenance and working*, and all that the Company was required to do, to secure its guaranteed interest during the 30 years, was *to maintain and work.* Everything, therefore, that the Governor was empowered to contract for, and all that the Company was required to do, were included under the terms *maintenance and working.* But all the expenditure for and in respect of the *maintenance and working* (46 Vict. No. 43, sec. 5) was to come out of revenue, therefore the cost of everything that was to be done under and in pursuance of the contract was to come out of the revenue of the line, and there could, therefore, be no profits till this cost had been deducted from the revenue; and I understood this position to be conceded by the Attorney-General when moving. If this position is correct, Dr. Madden having admitted and contended that additional works must be performed by the Company under the contract in case of increased traffic demanding them, then, in the face of the Acts of Parliament, their cost is to come out of the revenue of the line, so far as it admits, before there can be any profits. The Attorney-General did not impeach my direction upon the aspect of the case presented by the Counsel for the Crown at the trial, but he says that aspect of the case was wrong. No exception was taken to my direction that the supply of necessary additional stock, &c., was compulsory on the Company, and none could have been taken by the Crown, because on this question the direction was in accordance with expressed views of the Crown through its Counsel, Dr. Madden, with the Attorney-General sitting beside him; the only point left open and at issue between the parties being, not whether additional stock, &c. was to be provided by the Company, but how it was to be paid for in the first instance, Dr. Madden contending that the Company was bound to provide and pay for it, and that the cost of repairs and renewals only could be deducted from revenue, as distinguished from new works rendered necessary by increased traffic. On the Attorney-General's attention being called to the fact that Dr. Madden had at the trial put a different coustruction on the contract, he said he "totally differed with Dr Madden" in relation to the words in clause 6, and subsequently added that

he did not wish to go into the matter at all unfairly (of this I needed no assurance), but he presumed it would be open to him to say that he was mistaken at the trial. But the Crown took the chance of obtaining my decision in its favour upon what it then contended was the true construction of the contract, and after being defeated on that, now attempts to set up another and inconsistent construction, which was not suggested at the trial, and upon which I was never requested to give any direction whatever. But Counsel is bound by the course taken at the trial, and cannot, in moving for a new trial, set up a new case totally opposed to that set up at the original trial. The procedure is novel, and is sufficient ground for the refusal of the rule. The case, however, is one of great importance and responsibility, and I do not desire to let my decision rest upon so narrow a ground alone without giving also full consideration to the new construction that the Crown now proposes to put upon the contract. That construction is that the contract does not compel the Company to do more than to maintain and work the line with its original equipment as it existed when the line was opened for traffic in November, 1876, and that it is the cost of repairing and renewing this, and also of repairing and renewing any additional equipment (which the Company may voluntarily provide at its own cost), that is to be deducted from revenue in order to ascertain the profits. Is, then, the Company only bound to maintain and work the line as originally equipped for running two through trains daily each way? Now Clause 6 of the contract is as follows:—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.*" This clause, and especially the latter words "to afford," &c., clearly indicates or throws, as Dr. Madden said, "a great deal of light upon what was intended to be meant by the words 'maintain and work.'" The Company is to continue to afford all this during the 30 years. At the trial Dr. Madden said that the latter words, "to afford," &c., were redundant. I agree with him that to work the railway efficiently for 30 years would include the rest, and I ought to have expressed this view more unhesitatingly than I did at the trial. These so-called redundant words seem to me to express what might otherwise possibly have been open to contention; at any rate, they are valuable as giving the interpretation that both parties to the contract placed upon the words "maintain and work in an efficient manner," before any dispute arose between them. Moreover, if this is the interpretation given to the words "maintain and work" in that clause, they will, *primâ facie*, bear the same meaning wherever they are repeated in the contract. The Attorney-General, however, differs from the Counsel who addressed the Court at the trial, and says the words are not redundant, but remarked that they were confined to that clause alone, and afterwards contended that if the redundant words carried the construction of the contract beyond the restricted meaning which he placed upon "maintain and work" in the Acts, then they were *ultra vires*, as including more than the Governor was empowered by the Acts to contract for. The first remark is already sufficiently answered; as to the words being *ultra vires*, section 4 empowers the Governor to insert such provisions in the contract as he may deem necessary in order to secure the efficient working of the railway. At the trial the counsel for the Crown maintained that the words "to afford," &c. in clause 6 were inserted in pursuance of the powers conferred by that section upon the Governor, and I concur with them in this, and consider it a very reasonable provision for securing efficient working. There is yet another ground: this contract, as it stands, has been acted upon, and this portion of it has been so far carried out by the Company. Moreover, the parties have had differences and compromises under this contract, and the Legislature of the Colony has give effect to these compromises based upon this contract, and has recognised the contract, legislated upon it as a valid and subsisting contract, and it appears to me that it is too late now for the Crown to say that it is *ultra vires*. Looking again to the contract, the Company covenants to construct, *maintain, and work* the line in accordance with the conditions in the schedule; one of those conditions is as follows:—When the railway is completed and open for traffic, at least four trains shall run daily upon the said line from, &c. and to &c. 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 of the working of the railway, as well as regards the Company as the public. This has to be done under the covenant to "*maintain and work*," construction having ended. If traffic increased, and the Governor ordered ten extra carriages to be added to each train, and the original equipment was insufficient, as it would be to provide them, then this would be an instance of new and additional rolling-stock having to be provided under the covenant to maintain and work, and therefore would be inconsistent with the Attorney-General's contention that those words only meant repairing and renewing the original equipment. His answer to this again is that this provision is *ultra vires*. The observations I have already made as to the words in clause 6 being *ultra vires* apply with equal force to this objection. This provision also indicates the intention of the parties that the contract should include something more than the mere equipment with which the railway opened. Section 4 of 34 Vict. No. 13 provides that the "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." It certainly is remarkable that the Crown should now in its own favour seek to strike out of the contract any term that the Governor in Council thought necessary to insert as against the Company under this power. As the Company is bound under section 2 of the Act to work in an efficient manner for 30 years, it appears to me that the Legislature intended by section 4 to confer on the Governor power to insert stipulations in the contract to secure the efficient working of the line during the 30 years, and not merely the efficient working of the equipment with which it opened: so narrow and restricted a construction appears to

me unreasonable, and opposed to the intention of the Legislature as well as the contracting parties. Looking into authorities, I find that the words "work efficiently" in a railway contract have been the subject of judicial interpretation and decision in the case of *The West London Co.* v. *The London and North-Western Co.*, 11 *C.B.*, 254. The latter railway rented the former, and covenanted to *work it efficiently*, and to pay as rent (amongst other things) a certain proportion of the profits. In the judgment, on appeal to Court of Exchequer Chamber, p. 352, it is said—"We agree with the judgment of my brother Maule, that it never could have been intended that the defendant's company was to work the railway in such a manner as to produce the largest quantity of gross receipts. That might entail a ruinous loss on themselves. They were not bound to lay down a double rail where a single one was before, or to apply a part of their large capital to the erection of new stations, or to disarrange all their plans so as to make the plaintiffs' line of railway productive at the expense of their own. A fair and reasonable mode of working the railway so as make it productive is all that can be required." And, referring generally to a person or company under contract to "work efficiently," the Court says, p. 358, "*They could only be required to supply convenient accommodation and attendance for the receipt, and sufficient means of carriage of such goods and passengers as might be offered at one terminus or an intermediate station to be carried to the other terminus or some other intermediate station*, and this, however small the gross receipts might be." The language in the Main Line contract is "to work in an efficient manner," and in the case cited "to work efficiently," and in each case the parties are to participate in the profits. From this case it would appear that the Crown could, under the terms "to maintain and work in an efficient manner," compel the Company to "*supply* convenient accommodation and attendance for the receipt, and sufficient means of carriage, of such goods and passengers as might be offered" along the line. The Attorney General pointed out that the *Seven Oaks Co.* v. *Dover Co. L.R.*, 11 *ch. d.*, 634, was a later case, and so it is, but in it Sir George Jessel had to decide only whether certain new steps to a station came within the meaning of "maintenance and working," and he then defined "maintenance," but neither had to consider nor decide what "working efficiently" meant. Again, in the case of *In re Cornwall Mineral Ry. Co.*, 48 *L.J.*, *p.* 41, a waggon company let rolling-stock to the Railway Company at a rent, on payment of which for a term of five years the Railway Company was to become entitled to the stock, absolutely the rent being equal to purchase-money and interest. A receiver had been appointed under the Railway Companies Act, by section 4 of which moneys were not payable to creditors until after due provision "for the *working expenses* of the railway and other proper outgoings." It was held that the rent (which was *pro tanto purchase* money) of the rolling-stock was a "working expense, by *Jessel M.R.* and *Brett and Cotton, L.J.J.* So that authority, in the former case, is directly opposed, and in the latter inferentially so, to the narrow construction now set up by the Crown. At the trial, having the latter case in view, I asked Dr. Madden if the Company had hired new rolling-stock how the rent would be charged, he said to working expenses. The rent would include the interest on the original cost, a yearly sum for depreciation so as to repay the original cost during the life of the stock, and trade profits to the waggon company letting the stock. Now, none of the stock in dispute in this case can exist till the end of the 30 years, so if rented for its lifetime, as it would be interest on its cost, and its original cost, paid by yearly doles, would come out of revenue, and so would the trade profits besides. Whereas what the Company did as to the stock in dispute is this, it either built it in its own shops or bought it, paying the price at once, instead of in doles, and so losing interest on the price paid, but it pays no trade profits. The present is therefore, *as to the stock in dispute* (and it amounts to about £12,000 out of the £13,000 claimed,) financially a better arrangement than renting would be. According to the view then taken by the counsel for the Crown at the trial, this rolling-stock, if procured in the more expensive way by renting, would be paid for out of the receipts of the line; but when procured in the less expensive way, and the only available way in Tasmania, then this rolling-stock must be paid for out of the pockets of the Company. Of course as to stock obtained near the close of the 30 years the Company would be gainers. But a construction that produces such a result as I have pointed out cannot be upheld as a reasonable one, or adopted when there is any possible alternative. Looking next at the contract, and considering the financial arrangements, can anything be gathered as to the intentions of the contracting parties? First of all, looking at them as a whole, they seem to contemplate anything but the restricted construction now attempted to be put upon the contract by the Crown. Next, the Company was under all circumstances to receive at least £32,500 a year, either in guaranteed interest from the Crown, or partly in such interest and partly in profits, or wholly in profits. If it paid expenses, and earned something more than expenses, *i.e.*, "profits," then it became entitled to these profits, and so much interest from the Crown, as with these profits, would make up £32,500; but the Crown reaped all the benefit of these profits till they sufficed to pay the £32,500 a year. Should there be a surplus of profits after paying the £32,500 a year, a result which has not been attained, and is hardly likely to be attained during the residue of the 30 years, then that surplus, after giving £1 per cent. to the Company, is to be divided. If, then, the contention of the Crown *at the trial* is correct that the Company is bound to provide and pay for additional rolling-stock, &c., or if the directly opposite contention on moving for the rule is correct, that the Company is not bound to supply any additional rolling-stock, &c., but may voluntarily do so at its own expense to meet the increased traffic, then, and in either case, the Company would receive no interest on the money expended upon such additional rolling-stock, whilst the Crown would receive the whole of the profit arising from this expenditure by the Company, till that problematic time arrived, if it ever arrived, within the 30 years,

when the profits exceeded £32,500 a year, and the Colony would, moreover, all the time be reaping the advantage flowing from such increased accommodation. The framers of the contract must have foreseen that traffic on the line would increase, for, if even the Colony stood still and failed to progress, the line would create traffic for itself, and additional rolling-stock would from time to time during the 30 years become necessary, and for the Company to agree to pay for all the increased stock, and to receive virtually no return for the money so expended, whilst the Colony put the profits into its pockets, and also reaped the advantages of the increased accommodation, seems to be a most one-sided and unreasonable agreement. Yet such is the result of the construction the Crown seeks to put upon the contract. The strongest argument in favour of the Crown's contention, arising from the financial arrangements, appears to me to be that the Crown, having a right to purchase the railway, the Company by materially adding to its value with, as is alleged, the money that belongs to the Crown, prejudicially affects the right of purchase, for the Crown would then be buying with the railway the very additions made with its own money. To analyse this argument. First, it is not contended that the Company is not at liberty to improve the Line with its own money during the 30 years, although it might greatly enhance its value when the Crown desired to purchase. Secondly, the argument rests on the assumption that the money is the Crown's, but this is a complete *petitio principii*. For if by the contract this money is to be applied in these works this was part and parcel of the original consideration between the parties, and the money never became the property of the Crown. Again, the Crown may purchase at once, and so put a stop to further additions in value, or it need never purchase the Line. There is no compulsion to purchase, but in my opinion, and in the opinion of the Crown at the trial, there is compulsion on the part of the Company to put on sufficient rolling-stock, &c. On the whole, the construction placed upon the contract by the Company, and by the Crown up to the time of this rule being moved, "*that the Company is bound to provide sufficient accommodation for increased traffic*," seems to me to be the only reasonable interpretation of the contract. It accepts the plain meaning of the language used, and does not require, as the Crown's new construction does, the omission of parts of the contract, viz., words in clause 6 and in the schedule to the contract, as being *ultra vires*. It is in accordance with the decision of the Court of Exchequer Chamber to which I have referred. The suggested difficulties and inconsistencies arising from the financial view cut both ways, but the preponderance of argument to be derived from them seems to me to be strongly opposed to the Crown's contention; but this preponderance, except as indicating intention, cannot affect the construction. I refrain from canvassing the results that might flow from the Crown's new construction in order to test the reasonableness or otherwise of that construction. Finally, on broad grounds, and after fully considering the question, I cannot hold that a contract "*to maintain and work a railway in an efficient manner*" can be performed otherwise than by supplying sufficient equipment to provide reasonably sufficient means for accommodating and carrying the traffic along the Line; and the use by the Crown and Company of the additional words "*so as to afford all sufficient station accommodation and due facilities for the passenger and goods traffic of every portion of the Line*," satisfies me that the Crown and Company never meant nor intended the contract to bear the narrow and restricted construction now contended for by the Crown, but that they both meant and intended the contract to bear as its construction precisely what is expressed by those words in their simple and obvious meaning.

The rule is refused upon both grounds.

THE ATTORNEY-GENERAL applied for leave to appeal to the Privy Council. He explained that he followed thus speedily upon His Honor's judgment owing to the fact that his time limit for making this appeal date from the time of refusal of the rule—the Friday preceding.

MR. BYRON MILLER raised the question of terms; and after discussion by Counsel and the Court of this point,

Leave was granted upon payment of the amount recovered with costs, and an undertaking by suppliants that in the event of the appeal being sustained the amount shall be deducted out of further payments of guaranteed interest, and shall bear interest at the rate of 5 per cent.

Attorney-General's Office, Hobart,
19*th August*, 1889.

MEMORANDUM FOR THE HONORABLE THE PREMIER.

Re THE TASMANIAN MAIN LINE RAILWAY COMPANY *versus* THE QUEEN.

THE trial of this action having resulted in a verdict in favour of the Suppliants for the sum of £13,224 17*s.* 5*d.*, and the Supreme Court having subsequently refused the application made to it by the Crown for a *Rule Nisi* calling upon the Suppliants to show cause why a new trial should not be granted, on the ground that the direction given to the jury by the presiding Judge was erroneous in point of law, it becomes my duty to submit to the Honorable the Premier the following observations upon the judgment of the Court, and the position in which the Colony finds itself under it, in order to assist the Cabinet in arriving at a decision as to the propriety of appealing to the Privy Council in the matter. His Honor the Chief Justice presided at the trial of the action, and the other two Judges declined to take any part in the subsequent judgment of the Court in the matter because they had been engaged in the case during its earlier stages as counsel for the Crown; and the judgment of the same Judge who presided at the trial therefore stands as the judgment of the Court upon the contention of the Crown that his direction to the jury was erroneous in point of law. This fact alone might make it desirable to obtain the decision of an appellate tribunal upon a question pregnant with such important consequences to the Colony as those which depend upon the interpretation of its contract with the Suppliants. At the same time, I would not hesitate to advise the Cabinet to accept the Chief Justice's interpretation of the contract if I thought that the arguments which he adduced to sustain it conclusively and exhaustively refuted every contention urged upon the Court in support of the application for a new trial, and that his decision upon the issue immediately before him removed all difficulty in the way of deducing from the provisions of the contract similar and consistent determinations of all the parallel issues which they suggest. But I am not prepared to say that I am of that opinion, and I now proceed to point out the particulars in which it appears to me that the judgment of the Chief Justice fails to supply conclusive answers to the contentions of the Crown as to the extent of the Suppliants' rights and obligations under the contract.

The actual and essential question upon which the dispute between the Colony and the Tasmanian Main Line Railway Company has arisen is this, viz.:—Is the cost of additional buildings, rolling-stock, and other plant provided from time to time by the Company to grapple with the increased traffic of the railway chargeable under the contract as part of the expenditure which is to be periodically deducted from the gross revenue of the line for the purpose of ascertaining whether or not any profit has been made by the working of the railway during the period for which the deduction is made? The contract originally provided, in clause 8, that the Company should furnish to the Governor, 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 could be made up in the Colony, and that the Governor should pay to the Company within fourteen days next after the delivery of each such Abstract such amount of money as would, with the profit (if any) of the preceding quarter, make up interest at the rate of five pounds per centum per annum on £650,000 or such less sum as the railway and works might cost, and so on from quarter to quarter. But Section 5 of 46 Victoria, No. 43, passed ten years after the contract was signed, and six years after the railway was opened for traffic, enacts that "In the accounts of the said Company to be rendered pursuant to the said contract the revenue and expenditure for and in respect of the maintenance and working of the said railway shall be adjusted on the principle of yearly balances;" and it then proceeds to enact that "The Quarterly Statements provided for by the said contract shall be rendered and audited as heretofore, and the balance of profit and loss shall be struck yearly, and if such yearly balance shows a profit upon the working of the said railway for such year, such profit shall be deducted from the guaranteed interest as provided by the contract, and if such yearly balance shows a loss on such year, such loss shall fall upon the Company, and shall not be brought forward to another succeeding year." In his direction to the jury the Chief Justice said that he took the word "profit" as used in the contract to be "the revenue of the railway after deducting the cost of maintenance and working" (*vide* Official Report of Trial, p. 116); and in my argument in support of the application for a new trial I accepted that definition of the word "profit," while objecting to the Chief Justice's interpretation of the words "maintenance and working." But His Honor, in his direction to the jury, proceeded to speak of the Act 46 Victoria,

No. 43, as "the newest revelation upon the interpretation of the contract," and, in his subsequent judgment in the case, he cites Section 5 of that Act as if it is expressly directed that all "expenditure for and in respect of the maintenance and working of the said railway" which should from time to time be shown "in the accounts of the Company to be rendered pursuant to the said contract" should be deducted from "the revenue" shown in the same accounts, and that the balance (if any) so produced should be the "profit" which is to reduce the amount of guaranteed interest payable by the Governor to the Company. If the section contained any such direction, it would support the Chief Justice's interpretation of the contract only upon the preliminary assumption that the "expenditure" therein mentioned included items which the Colony has always contended should be paid for out of capital. But I cannot find any such direction in the language of Section 5 of 46 Victoria, No. 43. That section provides that "the revenue and expenditure for and in respect of the maintenance and working of such railway *shall be adjusted* on the principle of yearly balances," but it says nothing about "profit" in connection with the adjustment of such "revenue and expenditure." The "balance of profit and loss" is directed by the subsequent portion of the section to be struck yearly from the "Quarterly Statements provided for by the said contract." These "Quarterly Statements" are described in the contract as "Abstracts of receipts and expenditure," without the addition of the words "for and in respect of the maintenance and working of the said railway," and must therefore be taken to mean and include the total receipts and expenditure of the Company in connection with the railway, irrespective of the question whether any part of such expenditure would be charged and classified according to the usual system of keeping railway accounts under the head of "maintenance and working" or not. The accounts of all commercial undertakings like railways are arranged, when properly kept, under a number of separate heads, such as Capital Account, Construction Account, Revenue Account, Working Expenses, &c., and *to adjust* at fixed periods such a series of accounts is to ascertain their respective balances at the close of each period, and then to transfer such balances to their proper places in a Profit and Loss Account, so as to show the results of the operations of the undertaking during the period; and this is what the Company are required by Section 5 of 46 Vict. No. 43 to do once in every year in regard to the "revenue and expenditure for and in respect of the maintenance and working of the said railway," which "revenue and expenditure" are referred to by the same section as being "*in* the accounts of the said Company to be rendered pursuant to the said contract," but not as constituting those accounts *in toto*, or as being the only accounts of the Company from which it is to be ascertained what "profit," if any, has arisen out of the working of the railway for any year. Whether or not any "profit" has been made by working the railway in any year is left by the contract, and by all the Acts of Parliament relating to the contract, to be determined upon the same principles and by the same methods that are universally relied upon and used to determine that question in connection with all similar undertakings and speculations. Neither the contract nor the Act of 46 Vict. No. 43 professes to give any new definition of the word "profit," or to provide any new method by which "the profits" accruing to the Company from working this railway are to be ascertained. We must therefore conclude that "the profits of the railway" mentioned in "The Main Line of Railway Amendment Act" (34 Vict. No. 13) and which are therein, and also in the schedule to the contract, described as "the profits of the railway arising from the traffic thereon," are profits in the ordinary meaning of that word as universally understood in the commercial world, and that they are to be ascertained by the same method of book-keeping as that by which the profits of all similar undertakings are ascertained. All correct book-keeping is simply a true record of the monetary results or aspects of transfers and transmutations of property, or, in other words, is simply an accurate representation in figures of a series of *facts*. If, therefore, a new asset has been added to the Company's property out of the earnings of the railway in any year, that *fact* ought to be so recorded, and the earnings or revenue of the railway for that year credited with the value of the asset; and if that fact is not so recorded, but, on the contrary, the value of the asset so acquired is registered as expenditure incurred in producing the very earnings or revenue out of which the asset has been purchased, the accounts containing such an entry become false records of the things they profess to represent, and are absolutely worthless for the purpose for which accounts are kept throughout the mercantile world. In my argument in support of the application for a new trial, I contended that the Chief Justice's interpretation of the words "maintain and work" as used in the contract made between the Tasmanian Main Line Railway Company and the Colony was inconsistent with the true meaning of the word "profits" as used in the contract, and could be accepted only at the expense of giving to the word "profit," as used in the contract a new and unwarranted meaning, for which no authority can be found either in the contract itself or in universal practice. I can find nothing in the contract, or in any of the Acts of Parliament relating to it, which indicates that the Company are to be permitted or authorised to keep their accounts in a different form from that which is recognised in the commercial world as the proper form in which the accounts of all such undertakings should be kept. The universal practice in the book-keeping of railways is to keep a "Capital account" distinct from the "Revenue account" and from the "Maintenance" and "Working Expenses" accounts. But the Manager of the Tasmanian Main Line Railway Company says that their Capital account is closed. There is no provision in the contract, or in any of the Acts relating to it, authorising the Company to close their Capital account, and thereafter to include in their Maintenance or Working Expenses account items that would otherwise be found in their Capital account; and seeing that they are required by the contract to furnish

on the last day of every quarter in the year "an Abstract of their receipts and expenditure for the preceding quarter so far as the same can be made up in the Colony," any unauthorised departure on their part from the universally approved method of keeping railway accounts, so long as the Colony is liable to pay any portion of the guaranteed interest, is in itself a breach of the contract. This proposition appears to me to be placed beyond all dispute by clause 11 of the contract, which provides that so long as the liability of the Colony to pay any guaranteed interest continues, "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." If the books and accounts kept by the Company are not correct records of the facts which they profess to represent, they are worthless for verifying the quarterly abstracts, and there is therefore a frustration of the clear intention of the contract, that the question whether any "profit" was made or not in any year should be subject to a full investigation by the Colony. In my argument in support of the application for a new trial, I stated that the word "profit," as used in the contract, included "anything gained or acquired in any one year from the working of the railway which did not exist at the beginning of that year," and that "if in any one year between January and December there had been added to the railway a new station or new rolling-stock to the value of £10,000, and the railway has been efficiently maintained throughout its entire length during that year, and there is also a cash balance on the year's operations of the sum of £22,500, then there is actually a profit made to the amount of £32,500, and the Government should be relieved of all liability to pay any guaranteed interest for that year." This contention is founded upon the meaning given to the word "profit" throughout the commercial world, and upon the fundamental principles of book-keeping as expounded by all the best recognised authorities and experts upon the subject. I extract here a quotation on this point from *Hamilton and Ball's Principles of Book-keeping*, published in the *Clarendon Press Series*. At page 30 will be found the following statement:—"All expenditure which partakes of the nature of replacement or the making good of wear and tear clearly does not increase assets, and therefore should be charged to Profit and Loss, but all expenditure for additional buildings, or for improvement of existing buildings or machinery, constituting absolute additions to their extent or efficiency, increases their value, and is, therefore, a legitimate charge to Capital." At page 24 of the same work, the balance of the Profit and Loss account of any undertaking for a given period is stated to be "*the difference between the value of the assets less liabilities at the commencement of that period, and the value of the assets less the liabilities at the close of that period.*" These are not questions of law dependent upon judicial interpretation of the word "profit" as used in mercantile contracts, but are matters of fact and universal custom, which the Courts of Law will recognise and act upon in the case of every mercantile contract in which the parties have not clearly agreed to give to the word "profits" a special and unusual meaning for the particular purposes of that contract. I have already said that I can find no trace of any such agreement in the contract made between the Colony and the Tasmanian Main Line Railway Company, and I now proceed to produce authorities for my contention that in the absence of any such agreement the word "profits" will be interpreted by the Courts of Law as having the same meaning which it has throughout the commercial world. In the case of *Lee v. Neuchatel Asphalte Company*, decided in the Court of Appeal so recently as the month of February in the present year, and reported in *Law Reports, Chancery Division*, volume 41, page 1, it became necessary for the Court to consider the true meaning of the word "profits." The plaintiff, who was a shareholder in the defendant company, brought an action on behalf of himself and other shareholders claiming a declaration that the company did not in the year 1885 earn a profit, as alleged by the directors, and claiming an injunction to restrain the Company and the directors from paying a dividend on the ground that there were no profits available for that purpose. Lord Justice Lindley, speaking of the provisions of the Companies' Acts relied upon by the plaintiff, says in his judgment (page 20), "There is nothing at all in the Acts about how dividends are to be provided for, how profits are to be reckoned; *all that is left, and very judiciously and properly left, to the commercial world. It is not the subject for the Act of Parliament to say how accounts are to be kept; what is to be put into a capital account, what into an income account, is left to men of business.*" And later on, in the same judgment (page 23), he says "If you want to find out how you stand, whether you have lost your money or not, you must bring your capital into account somehow or other." Lord Justice Lopes, in his judgment in the same case (page 26), defines "annual profits" as "*profits arising from the excess of ordinary receipts over expenditure chargeable to the revenue account.*" The same recognition and adoption by the Courts of Law in England of the meaning given to the word "profits" by universal custom in the commercial world will be found in the following earlier cases:—(1) *In re The Mercantile Trading Company* (reported in *Law Reports, Chancery Appeal Cases*, volume 4, page 475), in which a certain sum distributed by the directors of the Company in dividends was declared to be "profits" within the meaning of the provisions in Table A. of the Schedule to "The Companies Act, 1862," which provides "that no dividend shall be payable except out of profits arising from the business of the Company." An exactly similar provision is found in Table A. of the first Schedule to "The Companies Act, 1869," of this Colony, and neither in the Act of the Imperial Parliament nor in the Tasmanian Act is any definition given of the word "profit;" and on every occasion on which the Courts in England have had to apply that provision to cases in which Companies formed under the English Act have been parties, they have invariably given to the word "profits" the same meaning which it has in the

commercial world. (2.) In the case of *Mills* versus *The Northern Railway of Buenos Ayres Co.* (reported in *Law Reports, Chancery Appeal Cases*, volume 5, page 621) the distinction made in mercantile accounts between items chargeable to Capital and items chargeable to Revenue was fully recognised; and Lord Hatherley, L.C., in his judgment (page 630), says:—"No doubt many great frauds have been practised by companies both upon themselves and sometimes, unfortunately, upon the public, by carrying to capital account things which ought to go to revenue account, and thereby leaving an imaginary profit which is no profit at all." And in connection with the particular item of rolling-stock, he says (page 631):—"I do not know exactly on what principle Railway Companies proceed in their accounts with respect to their locomotives, whether the whole value should be credited, or whether a deduction should be made annually for the stock wearing out, or whether the value of the stock should be taken, which would be the more regular course, at the end of the year. *But, certainly, that new rolling-stock is in a sense capital as long as it lasts, and that its value at each succeeding stock-taking is capital there is no doubt whatsoever.*" (3) *In re The County Marine Insurance Company*, (reported in *Law Reports, Chancery Appeal Cases*, volume 6, page 104), the question of the correctness of the Company's balance sheet, which professed to show the existence of a profit, was considered, and in that case the word "profits" was held to mean profits in the ordinary mercantile sense, and it was decided that "where the Directors declared a dividend or bonus without proper investigation or *professional assistance*, and it is afterwards called into question, the burden lies on them to show it was fairly paid out of profits, and if they are unable to do so, the Court will order them to refund what they have received." In this judgment we have a distinct recognition of the question of existence or non-existence of profits as a matter determinable by experts or "*professional assistance*," and not a matter of law or judicial interpretation. (4) In the case of *The Coltness Iron Company* versus *Black*, (reported in *Law Reports, Appeal Cases*, volume 6, page 351), Lord Blackburn did not hesitate to quote a passage from *M'Culloch's Political Economy* as an authority on the proper meaning of the word "profits." (5) In the cases of *Dent* versus *The London Tramways Company*, and *Davidson* versus *Gillies*, (reported in *Law Reports, Chancery Division*, volume 16, pages 344 and 347), Sir George Jessel, Master of the Rolls, decided that "profits for the year" meant "the surplus in receipts after paying expenses and restoring capital to the position it was on the 1st of January in that year." The Articles of Association in that Company provided that no dividend should be paid except "out of profits," and that the Directors, before recommending dividends, should set aside "out of profits" a reserve fund for "maintenance, repairs, depreciation, and renewals;" and it was decided that the holders of preference shares, the dividend on which was dependent upon the profits of the particular year only, were entitled to a dividend out of the profits of any year after setting aside a proportionate amount sufficient for the maintenance of the tramway for that year only, and were not to be deprived of that dividend in order to make good the sums which in any previous year should have been set aside by the Company for maintenance, but which had been improperly applied by them for paying dividends. This decision clearly supports the contention that the annual "profit" of any undertaking is the whole balance of the receipts of the year after deducting the expenditure incurred in maintaining and working the undertaking in the same condition as it was at the beginning of the year. No subsequent disposal or appropriation of any part of that balance can transform it from "profit" into "working expenses," or into anything else than "profit;" and, therefore, any portion of the earnings of the Tasmanian Main Line Railway for any year which (if unexpended) would remain as a balance in hand after payment of the cost of working and maintaining the railway in the same state of efficiency that it was in at the beginning of that year is a "profit," notwithstanding that it may be expended before the end of the year in providing additional rolling-stock or new stations, and thereby adding new assets to the property of the Company.

I have dwelt at length upon the question of the true meaning of the word "profit" because I am of opinion that the root of the Chief Justice's misinterpretation of the contract is to be found in his erroneous opinion that Section 5 of 46 Vict. No. 43 supplies a new definition of that word for the purposes of the contract, or, in other words, gives directions for ascertaining what the contract means by "profits." I am also desirous of giving special prominence to the argument that the word "profits" has the same meaning in this contract that it has in its ordinary usage in the commercial world, because the Colony has relied upon this contention at every stage of the case now under review. It was adopted by Dr. Madden as the basis of his argument at the trial, and was urged by me upon the Court at some length in the subsequent proceedings. It has been stated that I have abandoned the case set up by Dr. Madden for the Colony at the trial, and the Chief Justice seems to entertain a similar opinion, inasmuch as he has, in addition to the ground that his direction to the jury was not erroneous in point of law, refused the application for a new trial on the ground that the interpretation I strove to put upon the contract in my argument before the Full Court was not the interpretation put upon it by the counsel for the Crown at the trial. It is perfectly true that in my argument in support of the application for a new trial I dissented from the interpretation that was put upon the contract by Dr. Madden in his address to the jury at the trial in regard to the extent of the obligations of the Company under the contract, but he and I have never differed as to the interpretation of the words "*maintain and work*," and it was upon an alleged misdirection of the jury as to the meaning of these words that the application for a new trial was made. Dr. Madden contended all through his argument that the Colony could not be called upon to contribute under

the contract to the cost of new rolling-stock and additional buildings and machinery, which constitute additional assets to the Company's property, and that the cost of all such additional assets was not chargeable under the contract as part of the expenditure incurred in "working and maintaining" the railway; and throughout the whole of my argument before the Court I adhered, and still adhere, to that contention, and regard it as the essential point of the dispute between the Colony and the Company. I therefore think that the application for a new trial was wrongly refused upon the alleged ground of my setting up a new case for the Crown before the Full Court, and the Colony should not be prejudiced in its appeal to the Privy Council by the difference between Dr. Madden and myself upon what I take leave to describe as a strictly subsidiary, if not a totally independent question. The subsequent judgment of the Chief Justice clearly shows that his direction to the jury would have been substantially the same, and would have embodied the same interpretation of the contract, if my contention as to the extent of the Company's obligations had been then distinctly placed before him and the jury at the trial. The question upon which Dr. Madden and myself entertained different opinions is this, viz., *What are the Company bound to do under the contract in order to entitle them to receive the benefits reserved to them by it?* The question upon which the Colony and the Company are at issue is this, viz., *Assuming that the Company do all that they are bound to do under the contract, what items of expenditure incurred by the Company in any year in performing their contractual obligations are to be deducted from the Company's receipts in order to ascertain what profit (if any) has arisen upon that year's transactions, so as to determine the amount of guaranteed interest to be paid for that year?* If I failed to make clear to the Court the extent to which Dr. Madden and myself agreed upon the interpretation of the contract, and the distinctly subsidiary nature of the question upon which we differed, I must attribute it to the difficulty I encountered in propounding my argument in the midst of the interruptions from the Bench. I think that any person perusing the report of my argument would see that I desired to reserve for separate statement the point whereon I differed from Dr. Madden in his interpretation of the contract, but the interrogations of the Bench compelled me to indicate much earlier than I intended the difference of opinion between Dr. Madden and myself, and throughout the remainder of the argument the Chief Justice constantly applied that difference of opinion to test other branches of my argument with which it was not in any way connected, and thus gave that difference of opinion an association with the whole of my argument which I do not consider it should occupy. The Company came into Court asserting that they had fulfilled all their obligations under the contract, and were therefore entitled to all the benefits reserved to them by it. The Crown did not traverse that allegation, and it was therefore not in issue at the trial. The Crown's contention was that the Company were claiming more than the benefits reserved to them under the contract, and on this contention the Company joined issue with the Crown, and went to trial upon it. Other issues could have been raised upon the pleadings as they were originally framed, but, by an arrangement made before the Chief Justice in Chambers, all other defences to the action were abandoned, except the central and substantial defence that the accounts of the Company rendered pursuant to the contract showed that profits had been made by the Company from working the railway during the period in respect of which the amount claimed in the action was alleged by the Company to be due to them from the Colony, and that such profits, together with the sum paid by the Colony to the Company in respect of the period in question, made up the full amount which the Company were entitled to receive from the Colony under the contract for that period. Dr. Madden and I both contended that this defence was supported by the true meaning of the words "maintain and work" as used in the contract, and that the Crown was therefore entitled to a verdict. I therefore fail to see how the difference of opinion between Dr. Madden and myself on the extent of the Company's obligations under the contract can be regarded as affecting the question whether the Chief Justice's interpretation of the words "maintain and work" was correct or not. Dr. Madden and I both said that that interpretation was incorrect, and contrary to law, and on that contention—and on that contention only—was the application for a new trial made so far as it was based upon the ground of alleged misdirection of the jury. I therefore trust that when the case gets before the Privy Council the judgment of our Court on this point will be overruled. Perhaps if the *Rule Nisi* had been granted, the further argument that would have taken place upon the application to make the rule absolute would have made it clear to the Court that Dr. Madden and I were in perfect accord in our interpretations of the words "maintain and work." It frequently happens that the first statement of an argument leaves an incorrect or imperfect impression of its nature and extent upon those to whom it is addressed, and subsequent discussion rectifies that impression; and if the Colony has been prejudiced in this matter by the want of further argument, I can only express my regret that the Court did not regard my effort in support of the application for a new trial as deserving of a reply from the other side.

The interpretation placed upon the contract by Dr. Madden in regard to the obligations laid by it upon the Company is a perfectly intelligible interpretation, and one which I do not hesitate to say can be very strongly supported; but I am of opinion that he abandoned one of the most legitimate and powerful arguments available in support of it when he stated that the word "construction," as used in the contract, "simply meant the construction of the line as then contemplated, which was to be opened for traffic within about four years of the start of the undertaking" (*vide* Official Report of Trial, page 80). The Chief Justice, in his summing up to the jury, adopted a similar line of argument when he said, "Construction is completed, and what we have now to deal with is main-

tenance and working," (*vide* Official Report of Trial, page 116); and, when speaking subsequently of the increase of traffic that must naturally be expected to arise in the case of a new railway, His Honor said (page 117): "Except as to what is included in maintenance and working, the contract is absolutely silent as to the necessities that must arise, and that in the near future. If there was necessity to specially mention these things, it would be a very imperfect contract if it did not do so. It is the contention of the Crown that no provision whatever of this kind is made in the contract." The restriction thus put by both Dr. Madden and the Chief Justice upon the meaning of the word "construction" is perfectly consistent with my interpretation of the contract, and I accept and rely upon it as one of the arguments in support of my interpretation; but if Dr. Madden's interpretation of the contract is correct, then it appears to me that a much wider meaning must be given to the word "construct" when interpreting the Company's obligation "*to construct*, maintain, and work a line of railway between Hobart and Launceston." In all correct railway book-keeping there is an account called the "Construction Account," which is never closed so long as the railway is in operation, and one witness for the Company in the late trial (Mr. Price Williams) positively stated that all the items in dispute in the late action were properly chargeable under the head of "progressive construction" (*vide* Official Report of Trial, page 50). His evidence on this point was as follows:—"Construction has, of course, two meanings; there is construction as regards the primary construction of the line, and construction as regards its equipment after it is open for traffic, that is, progressive construction to meet the requirements of growing traffic." If this is a correct interpretation of the word "construction," the Crown is entitled to the benefit of it in relation to this contract, and the Company are therefore bound to supply everything that will come under the head of "construction" as so interpreted. The only clause in the contract which could be quoted in opposition to such an interpretation of the word "construction" is clause 15, which says, "that 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." Here we have the phrase "period of construction," which undoubtedly refers to a period prior to the opening of the line for traffic, but there was no necessity to use that phrase for the purpose of making the provision contained in the clause in which the phrase is used. The clause in question would have had the same legal effect, and would have been as explicit and comprehensive, if the words "during the period of construction" had been omitted, and the clause had read "all profits arising 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." It might, therefore, be legitimately contended that the use of the phrase "period of construction" in clause 15 cannot have the effect of restricting or cutting down the meaning of the word "construction" when it is used in other parts of the contract; and we find it provided in the schedule "that the said railway, together with all stations, rolling-stock, and other works connected with the railway *shall be constructed* of the best material and in a thoroughly substantial manner." If the rolling-stock and other works herein mentioned include all additional rolling-stock and other works required to grapple with increase of traffic, then we have the word "constructed" used with regard to them; and if the Company are under obligation to find whatever additional rolling-stock and other works may be necessary to meet any increase of traffic throughout the duration of the contract, then according to the well understood meaning of the word "construction" in connection with the management of railways, that obligation would be included in the obligation "to construct," and not under the obligation to "maintain and work." I have no hesitation in saying that the Colony would be perfectly justified in taking its stand upon this contention, if there were no provisions in the schedule which appear to me to cut down the obligations of the Company to those which I set forth in my argument in applying for a new trial. But if I am wrong in my opinion as to the nature and extent of the obligations of the Company as specified in the schedule to the contract, then I most certainly think that, under the obligation "to construct, maintain, and work the railway," the Company are bound to provide all the additional stock and station accommodation required to grapple with increased traffic; but that the cost of such additional works are not chargeable to "maintenance" but to "capital" or "construction," and therefore cannot be calculated in reduction of profits. This contention is supported by the Company's own practice up to the year 1883, as shown by the accounts furnished by the Manager of the Company to the Government, in which a succession of sums were charged to the Capital account, under the head of "Additional Construction;" in the years 1878, 1879, 1880, 1881, and 1882, the total amount of the sums so charged being £114,788, and the purpose to which it was devoted was to provide an increased train service of 127,114 miles per year, or 52 per cent. above the amount of train service originally provided by the Company. We thus find that the cost of the additions to their property, for the provision of which the Company now contend they are entitled to absorb a portion of the earnings of the railway, was not regarded by them, previous to the year 1883, as properly chargeable against the revenue of the railway; and there can be no doubt that, if the Company were not short of capital, they would never have departed from their original practice, and the present dispute between the Company and the Colony would never have arisen, and the late action would never have been tried.

But my interpretation of the contract is that the Company are not bound to run more than four trains daily along the entire length of the line of railway, two starting from Hobart and two from Launceston, and that if the Company safely run those four trains at the minimum speed specified by

the contract, and fulfil all the other conditions of the contract as to the hours of starting, fares to be charged, quality of accommodation, carriage of mails, &c., they fulfil all their obligations under the contract. I base this contention upon the language of the first clause of the contract, which provides that "The Company shall construct, maintain, and work a main line of railway between Hobart and Launceston, *subject to and in accordance with the conditions set forth in the schedule.*" On turning to the schedule attached to the contract we find, as I said in my argument in support of the application for a new trial, that the details of the Company's obligations are therein set forth with a particularity that at once implies that everything was included which the Company were to be bound to do before the Colony incurred any reciprocal obligations. Not only the number of trains to be run, but the minimum speed and maximum fares, the quality of the accommodation for the passengers, the amount of luggage to be allowed to each, and, in fact, everything of a like kind that would be requisite to provide an efficient train service, is mentioned. The clauses of the contract which primarily create the obligations of the Company are quite general in their language, and must be interpreted by the particular provisions of the schedule in accordance with the recognised rule of interpreting deeds and documents, viz.: "That where a deed contains both a general, vague, or indefinite, and also an exact or particular statement of intention, the latter must prevail."—(*Elphinstone's Interpretation of Deeds*, page 113.) The exact and particular statement of the Company's obligations under the contract is contained in the schedule, and not in the general terms of the several clauses of the contract, and the paragraph of the schedule which specifies the amount and nature of the train service to be provided by the Company is as follows:—

"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."

A re-perusal of the contract and the schedule since the Chief Justice delivered his judgment has confirmed me in my opinion that the above quoted portion of the schedule limits the obligations of the Company to the extent that I contended in my argument before the Court, and I will now proceed to refer to several provisions in the schedule which I did not quote to the Court, and which appear to me to conclusively support my view of the extent of the Company's obligations under the contract. The fourth paragraph of the schedule says: "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 next paragraph says: "The whole of the said Works *shall be completed*, and the said Railway opened for traffic throughout, within a period of Four years from the date of the Contract." The 14th paragraph, previously quoted, provides that "When the said Railway *is completed* and opened for traffic, at least four trains shall run daily upon the said line throughout its entire length;" and the 16th clause of the Contract says: "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." In each of the provisions quoted we have something spoken of which is *to be completed* by the Company, and that something is sometimes spoken of as "the Works," or "the said Works," and sometimes as "the Railway," or "the said Railway." The word "Works" appears first in connection with this contract in "The Main Line of Railway Act" (33 Vict. No. 1); and Section 4 of that Act provides that "for the purposes of constructing the said railway and all *necessary works* connected therewith," *The Lands Clauses Act* shall be incorporated with the empowering Act. In the 5th section we find the phrase "the said Railway and other works;" and in the 6th section the phrase "Railway and works." Section 7 provides that, 'Subject to the provisions of this Act, it shall be lawful for such person or Company, for the purpose of constructing the said Railway and Works, to execute any of the following works;" and it then proceeds to enumerate what is comprehended by the word "works" as secondly used in the section, and thereby makes it clear that the word "Works," when used in the section as part of the phrase "the said Railway and Works," is distinguishable from the word "works" as used to include all the matters subsequently enumerated in the section. The 10th section of the same Act speaks of "The said Railway and their Works," and provides that the same "shall, as far as possible, be so made as not to impede, injure, prevent, or interrupt any ordinary or rightful traffic from the said public highways or streets respectively, and so as not to increase the cost of making, maintaining, repairing, and upholding the same." Section 15 provides that "Such person or Company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the Railway" and then proceeds to enumerate *(inter alia)* "such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway by the use of the lands through which the railway shall be made." In the last part of the section the works previously enumerated therein are referred to as "such accommodation works," and they are referred to again by the same description in several subsequent sections. It is therefore evident that the word "Works," when used as part of the phrase "the said Railway and Works" in the Act 33 Vict. No. 1, refers to things that would be required to be constructed as portions of the railway itself for the purpose of conducting the traffic upon it, and is plainly distinguishable from the word "works," which is sometimes used to comprehend such things as the

Company might find it necessary to provide for the purpose of constructing the railway, and sometimes to cover such things as might be required to be constructed for the convenience of adjoining landowners. Passing to "The Main Line of Railway Amendment Act" (34 Vict. No. 13), we find it provided by section 5 that "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 sufficient 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." In order to make this section intelligible it is absolutely necessary to read the word "works" when used in it as having the same meaning as the phrase "the said Railway and whole undertaking" which occurs in the beginning of the section; and Mr. Miller, in his address to the jury at the trial (*vide* Official Report, page 112), quoted this section in its entirety to support his contention that the Company were bound by the contract to provide additional rolling-stock, &c. to carry whatever increased traffic came to the railway. In my argument before the Court, I contended that the language of the 5th section of 34 Vict. No. 13 covered everything that was included in the words "maintain and work" as used throughout the contract; and I adhere to that interpretation of the section, which I believe to be also the interpretation placed upon it by the Chief Justice as well as by the Counsel for the Suppliants at the trial. But if the Colony is right in its contention that the words "maintain and work" do not include the provision of additional rolling-stock and additional station accommodation to grapple with increasing traffic, then section 5 of 34 Vict. No. 13 is confined in its operation to the railway as it was originally opened for traffic and accepted by the Colony as being constructed in accordance with the terms of the contract, and the Company are under no obligation to provide more rolling-stock and station accommodation than that with which the line was opened when it was accepted by the Colony. This is such an inevitable conclusion from the premises above stated, that Mr. Miller, shortly before he quoted section 5 of 34 Vict. No. 13 in support of the opposite contention, credited Dr. Madden with having put that interpretation of the contract to the jury (*vide.* Official Report of Trial, page 111.) If we turn now to the several provisions of the schedule in which the word "Works" is used for the purpose of ascertaining what things are comprehended by that word in the schedule, we find that in the 4th paragraph of the schedule which I have already quoted, the word "Works" is the only word used to cover that which is thereby required to be "commenced within Six calendar months after the date of this Contract," and to be thereafter "diligently prosecuted until *completion.*" But what is it that which is to be "commenced within Six calendar months," and to be "diligently prosecuted until *completion*"? Is it not "the Railway"—"the whole undertaking"—which the Company contracted to construct? The next paragraph says: "The whole of the said Works *shall be completed* and the said railway opened for traffic throughout within a period of Four years from the date of the Contract." What is it that is again here described as "the whole of the said Works," and which is *to be completed* within the time specified? Is it not "the Railway" and "the whole undertaking" which the Company contracted to construct? It therefore appears clear to me that the word "Works" as used in the schedule to the contract and in clause 5 of 46 Vict. No. 43 must be taken to include everything that the Company is bound "to construct, maintain, and work." In other words, that which is covered by the words "construct, maintain, and work," in the contract is something which is *to be completed* within four years from the date of the contract, and there is no indication throughout the whole of the contract that the Company are to be under any further obligation *to add to or increase* that which they have contracted *to complete.* The same conclusion must be arrived at by a consideration of the language of clause 16 of the contract. What is it that the Company are required by clause 16 of the contract to "keep and maintain in good and efficient repair and working condition," and when is their obligation to "keep and maintain" that thing "in good and efficient repair and working condition" to arise? The thing that they are to "keep and maintain in good and efficient repair and working condition" is "The said Railway and the Rolling Stock, and generally the whole undertaking," and the obligation to so "keep and maintain" it is to arise "*from and after the completion and opening of the said Railway.*" In other words, the obligation of the Company "to keep and maintain the same and the Rolling Stock, and generally the whole undertaking in good and efficient repair and working condition" is confined to something contemplated as capable of "*completion*" before the obligation arose, and that which is here contemplated as capable of "*completion*" is distinctly required by the schedule to be "*completed*" *within a specified time.* But there is no provision anywhere throughout the contract or the schedule, or in the Acts relating to the Contract, for *adding* to that which the Company are required *to complete.* The 14th paragraph of the schedule provides that "When the said Railway *is completed* and opened for traffic, at least four trains shall run daily upon the said line over its entire length." Here, again, we have the railway mentioned as a thing that is to be "*completed*" before it is opened for traffic, and if that which the Company are bound thereafter to "maintain and work" is something which is to be previously "*completed*," I do not see how the Company can be compelled to do more than maintain and work the railway as it was opened for traffic and accepted by the Colony under the contract. So strong is the language of the contract and the schedule in this direction that Mr. Fooks, in his address to the jury at the trial, could not avoid making statements that entirely

support my contention as to the true interpretation of the contract and the extent of the Company's obligations under it. As reported on page 7 of the Official Report of Trial, he said, when speaking of the railway :—"It was to be *completed*, and had to be maintained in working order. The Act of Parliament said clearly what had to be done. The gauge of the railway, weight of rails, construction of bridges, *the number of trains to be run*, speed, and all other things *were specified in the schedule* of the contract from which he quoted. That was to be the railway *as completed and opened with a view to profits*." Again, on page 12 he is reported to have said :—"The Company fulfilled their obligation, *and did a great deal more*, putting the Government in much more favourable circumstances. Instead of a minimum service of four trains daily that number had been very largely exceeded." The words that I have put into italics in the above quotations concede the whole foundation of my present contention.

In his direction to the jury at the trial the Chief Justice referred to the definition given to the words "maintenance and working" by Sir George Jessel in the case of *The Seven Oaks Maidstone and Tunbridge Railway* versus *The London Chatham and Dover Railway Company*, (reported in *Law Reports, Chancery Division*, volume 11, page 625), and admitted that if the words "maintain and work" had been used in this contract without any additional words to amplify or extend their meaning he would be bound by the definition given by Sir George Jessel in that case (see Official Report of Trial, pp. 118–9); and he subsequently said: "The question is, What do the words 'maintain and work' mean? If they stood alone I should say they meant renewals, repairs, and alterations, with improvements if necessary; but when it (the contract) goes on to say 'so as to afford all sufficient station accommodation and due facilities for the passenger and goods traffic on every portion of the line,' do not the parties enlarge the meaning of the words? . . . That is the construction I put upon it, and I shall tell you that 'maintaining and working' do not embrace simply making repairs, and renewals, but they embrace whatever is necessary—reasonably necessary—so as to afford sufficient accommodation for passengers and goods traffic on every portion of the line." But when I quoted that portion of His Honor's summing up to the jury in my argument before the Court, the Chief Justice said that he had not been "bold enough," and he had since come to the conclusion that the words "to work and maintain the said line in an efficient manner," which are contained in the second section of "The Main Line of Railway Amendment Act," (34 Vict. No. 13), and which are repeated in clause 6 of the contract, included all that the subsequent language of clause 6 could be made to cover; and in his subsequent judgment His Honor has retained that position, and has quoted the decision in the case of *The West London Railway Company* versus *The London and North-Western Railway Company*, (reported in 11, *C. B. Reports*, page 346), as his authority for so interpreting the words "work in an efficient manner." His Honor has also cited the case of *In re Cornwall Mineral Railway Company*, (reported in 48 *L. T. Reports*, page 41), as a further authority for including the provision of additional rolling-stock among "working expenses." I have carefully perused the judgments in both the cases quoted by the Chief Justice, and have considered the facts upon which those judgments were given, and have come to the conclusion that both those cases are clearly distinguishable from the case now under consideration. In the case of *The West London Railway Company* versus *The London and North-Western Railway Company*, the defendant company had leased the railway belonging to the plaintiff company, and had covenanted amongst other things that they would "at their own expense during the continuance of the lease *efficiently work and repair* the railway and works thereby demised, *and indemnify the West London Railway Company against all liabilities, loss, charges, claims, demands, whether incurred or sustained in consequence of any want of repair, or in any manner connected with the working of the same railway or works*," and the plaintiffs were to share in the gross receipts of the demised railway in the proportion of one-fourth, and to receive half the net profits of the rates and tolls payable by those using the locomotive power of the railway. It was contended on behalf of the plaintiffs, firstly, that the true meaning of the defendants' covenant *efficiently to work* the railway demised was that they should work it in the manner in which railways are usually worked, and in which the particular railway in question had previously been worked, namely, *with passenger trains as well as with goods trains*, and, further, that the defendants should perform their covenant by working the railway in such a manner as to be productive of the largest amount of net profits. If the words "efficiently work" have any universal meaning as applied to railways, I do not see how the first of the above contentions can be repudiated, and, undoubtedly the Chief Justice in the case of the contract of the Tasmanian Main Line Railway Company has decided that to work the railway "in an efficient manner" includes the provision of facilities *for passenger* as well as for goods traffic; and if it should be for a moment contended that such was not the nature of the Company's obligation, the answer would immediately be that it is so expressly provided in clause 6 of the contract. But if the Chief Justice is to rely simply and entirely upon the words "work and maintain the said line in an efficient manner" as they are found in "The Main Line of Railway Amendment Act," (34 Vict. No. 13), without taking notice of the language of clause 6 of the contract, then the case he quotes as the authority for his interpretation of the words in question is decidedly against his interpretation of them so far as he makes them include the provision of sufficient facilities and accommodation for *passenger* traffic. The decision of the Court of Exchequer on this point, as given in the head notes to the report of the case quoted by His Honor, was—"That, in order to perform their covenant to work efficiently, the defendants were not bound under all the circumstances to work the line for passenger traffic; but that if as much gross profits could be obtained by efficiently working the railway for goods only, or for passengers only, or for both passengers and

goods, the covenant was well performed." The judgment of Baron Parke on this point was as follows: "It seems (says he) a stronger thing to assert that they are not bound to carry passengers even if passenger traffic presented itself; but in truth the same answer is to be given,—that if they work the railway efficiently for goods, so as to produce as much gross receipts as the railway when worked for passengers and goods, or passengers alone, would produce, they perform their contract. The *mode* of working the railway is entirely in their discretion." The contention of the defendants was, that the word "efficiently" had no fixed or special meaning at all, and it appears to me that the Court of Exchequer substantially upheld this contention when it decided, in the words of the judgment of Baron Parke, that "the covenant to work efficiently must be construed with a reference to the subject-matter and the character of the defendants," and that "the word *efficient* must admit of a different construction in a covenant by a person armed with very limited or very extensive powers." The true meaning and effect of the covenant "to work efficiently" in this case was determined by the provision contained in the agreement made by the parties for a division of the receipts and profits of the railway, and the central point decided in the case, as given in the head note was, "that the defendants were bound to work the railway efficiently *so as to secure the stipulated benefits to the plaintiffs in the share of gross proceeds, but were not compelled to work it so as to produce the largest quantity of gross proceeds.*" The portion of the judgment of Baron Parke giving this interpretation of the covenant is as follows: "The railway (says he) is to be worked *efficiently* and *efficiently* repaired; and the plaintiffs are to share in the gross receipts in the proportion of one-fourth, and in half of the net profits of the rates or tolls payable by others, using their own locomotive power. *This shows that the object of the covenant to work efficiently was, to secure the stipulated benefit to the plaintiffs in the gross receipts, and efficiently to repair to give them the chance of a share of the net profits.*" In the face of the above quotations from the judgment of Baron Parke, especially the portion I have put into italics in the last extract, I must confess that I cannot understand how the Chief Justice regards the judgment in this case as applicable to the facts involved in the dispute between the Colony and the Main Line Railway Company. The judgment in the case quoted seems to me to clearly decide that the words "to work efficiently" or to "work in an efficient manner" do not contain or imply the obligation which the Chief Justice extracts from them when used in "The Main Line of Railway Amendment Act," (34 Vict. No. 13), and in order to sustain his position it seems to me he must fall back again on the language of clause 6 of the contract, as he did at the trial, but which he has since declared to be redundant and unnecessary for the purposes of his decision. If a return should be made to that position on behalf of the Company upon an appeal to the Privy Council, my reply thereto is that the general language of the contract must be interpreted and restrained by the particular stipulations of the schedule. The addition of the schedule to the contract in the present case, and the special reference to that schedule under the obligatory clauses of the contract, as containing the conditions in accordance with which the railway in question was to be constructed, maintained, and worked, places this case immediately in a separate and clearly distinguishable category from that of the case quoted by the Chief Justice, in which only general words were used, and in which no schedule containing particularities of the obligations incurred was present. It is also surprising to me to find the Chief Justice quoting the last-mentioned case as an authority for giving an ample and extended meaning to the covenant "to work efficiently," when the same case is quoted by Broom in his well known treatise on *Legal Maxims*, (page 621), as an illustration of *restrictive interpretation*, in accordance with the rule that the words of a general covenant shall be restrained according to the subject-matter or person to which they relate. In fact this rule is quoted by Baron Parke in his judgment in the case as specially applicable to the covenant in question.

The prominence and importance which it was intended that the schedule to the Colony's contract with the Tasmanian Main Line Railway Company should occupy, as containing and describing the extent of Company's obligations under it, is distinctly manifested by the insertion of clauses 2 and 3 of the contract, which are as follows:—(clause 2). "The Governor may add to, alter, or vary the said conditions mentioned in the said schedule, but so as the conditions as so added to, altered, or varied *shall not be more onerous upon or less advantageous to the Company than the conditions set forth in the schedule.*" Clause 3 says: "The conditions so set forth, or so added to, altered, or varied shall be treated as part of the contract, and fulfilled by the Governor and Company accordingly." No words could, in my judgment, be used to make it clearer that it was the express intention of the parties that the full nature and extent of the obligations contained in the contract should be sought for and found in the express provisions of the schedule, and that any obligation that cannot be found expressed in the schedule is non-existent for the purposes of the contract. If this be so, it follows that the Company cannot be compelled to run more than four trains daily upon the said line throughout its entire length,—namely, two trains daily from Hobart to the opposite terminus, and two trains daily from the opposite terminus to Hobart; and, therefore, apart from any question of whether certain expenditure should be provided out of capital or revenue, the Company cannot be required to provide additional rolling-stock to supply a train service exceeding four trains daily along the whole length of the line; and if they cannot be compelled to find such additional rolling-stock it follows that if they choose to find it for purposes of their own, it is a voluntary act on their part, and they cannot charge the cost of it to the working expenses of the railway under the contract so as to prejudice the Colony in regard to the diminution of the amount of guaranteed interest. The Chief Justice appears to consider the stipulation in the schedule that the four trains therein mentioned "*shall be of such capacity* and shall start at such hours as the Governor may from time to time

determine," authorises the Governor to call upon the Company to provide additional rolling-stock to grapple with increasing traffic; but I think that this is an erroneous interpretation of the language used. I contended in my argument before the Court that the Governor might demand four trains of the utmost length which the engineering skill of the day determined could be safely run upon the line, and the Chief Justice seems to be under the impression that I thereby admitted that the Governor could demand provision of additional rolling stock beyond the original equipment of the line. But that impression is incorrect, and I can only attribute it again to the difficulty I experienced in continuing my argument intelligibly amidst the interpositions of the Bench. My interpretation of the language in question is based upon the assumption, which, I believe, will be maintained by experts, that the original equipment of such a line as that between Hobart and Launceston would include sufficient rolling stock to provide a train of as great a length as could be safely run upon it whenever required, and the stipulation that the Governor may determine the capacity of the four trains is to protect the Colony and the Government against any attempt that might be made by the Company to provide a sham service consisting of only one passenger carriage for each class of passengers and a ridiculously small number of goods' trucks. The original equipment of every railway built for passenger traffic is supposed to be able to furnish the additional carriages required to convey such additional passengers as may certainly be expected to present themselves to travel on it *by the usual trains* on holidays and other special occasions, and the Suppliants cannot, upon their interpretation of the contract, contend that the original equipment of their line did not include sufficient carriages for that purpose, or, in fact, that it did not include sufficient carriages to furnish as long a train as could be safely run on the line at the minimum average speed specified in the contract; and therefore the power conferred by the contract upon the Governor to determine the capacity of the four trains therein specified to be run implies no power whatever to call upon the Company to provide additional rolling stock beyond what would constitute the proper equipment of the line when first opened for traffic. This proposition is placed beyond all controversy by the fact that the power of the Governor to determine the capacity of the four trains mentioned in the contract was exercisable by him to its fullest extent on the first day the railway was opened for traffic, and in regard to the very first train that ran upon the line under the contract. Whatever the Governor can do to-day under that power he could do then, and therefore the contract required that the original equipment of the line should be sufficient to enable the Company to comply with whatever demand the Governor is authorised to make upon them for train service. The Governor's powers under the contract are not augmented by lapse of time, nor are the obligations of the Company.

I contended at the close of my argument before the Full Court that if the language of clause 6 of the contract admitted of the interpretation given to it by the Chief Justice, it went beyond the meaning of the words "maintain and work" as used in the enabling Acts, and would therefore be *ultra vires*, and I accepted the contention of Mr. Ritchie, one of the Counsel for the Company, that "any consideration of the contract which shall be repugnant to the express provisions of the enabling Acts would be *ultra vires*, and cannot be permitted. The Acts and contract are to be read together, and if there is any divergence, the Acts, not the contract, must prevail." But I do not wish to insist upon that argument in favour of the Colony, and I am of opinion that it is not necessary for me to do so in order to establish the consistency of my interpretation of the contract; because if the words "maintain and work in an efficient manner" are capable of being interpreted and expanded by the words added to them in clause 6, the expanding words become in their turn the subject of review and interpretation in order to arrive at what the parties intended by the use of them. If, therefore, the obligations of the Company are to depend upon the language of clause 6 of the contract, it becomes necessary to ask what is "sufficient station accommodation," and what are "due facilities for the passenger and goods traffic of every portion of the line?" With regard to the station accommodation, the question is peremptorily settled by the provision in the schedule that "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.*" These words place the matter of station accommodation entirely in the discretion of the Company, and give the Governor or the Colony no power to demand additional accommodation at any station beyond that which the Company's Engineer considers necessary. In his summing up to the jury at the trial, the Chief Justice asked (Official Report of Trial, page 119) "If they (the Company) have to improve the station, are they not bound to do so, to enlarge it if not big enough?" The paragraph I have quoted from the schedule supplies an answer to this question directly in the negative. The Company are *not* bound to enlarge any station at the request of the Governor, and therefore any such enlargement is quite voluntary on their part, and is not included in the obligation "to keep and maintain in good and efficient repair and working condition" an undertaking which was to be "*completed*" when it was accepted by the Colony. *Completion* and *enlargement* are contradictory terms, and cannot stand together. There is nothing about *enlargement* of stations or of anything else in the contract, but there is repeated references to *completion* of the undertaking that was to be constructed and afterwards maintained. As to what are "due facilities for the passenger and goods traffic of every portion of the line," the stipulation that they shall be provided does not in the least degree imply that anything beyond the original equipment of the line is to be supplied. Efficiency of working and efficiency of accommodation and "due facilities" for traffic are requirements perfectly compatible with the limitation of the obligation of the Company to maintain and work the

railway with its original equipment. For it is indisputable that bad management or neglect might fail to run trains at convenient hours, or to provide the necessary number of carriages out of the original equipment to accommodate the passengers travelling from station to station, or might fail to secure comfort, or might incur danger, or entail delays in performing the journeys, either by the neglect to provide carriages and trucks of proper dimensions or shape, or by neglect of ordinary repairs, or by keeping an insufficient staff of servants, or by other forms of neglect and failure. All such inconveniences and discomforts would be a violation of the requirements to provide "all due facilities for the passenger and goods traffic of every portion of the line," and therefore there is no necessary variation and inconsistency between the language of clause 6 of the contract and the provisions of the schedule as interpreted by me. The words "*subject to and in accordance with the conditions set forth in the Schedule at the foot hereof*" must be read into every clause of the contract which refers to anything that would be embraced by "construction," or "maintenance," or "working," and therefore clause 6 must be read as if they were attached to it, and its language must be controlled and interpreted by them. But, while I do not desire to insist upon the argument that the language of clause 6 is *ultra vires*, and, as I have said before, I do not consider it necessary for the consistency of my interpretation of the contract, I feel compelled to notice the reply which the Chief Justice makes to that branch of my argument before the Court. He says that "the parties have had differences and compromises under the contract, and the Legislature of the Colony has given effect to those compromises based upon this contract, and has recognised the contract legislated upon as a valid and substantial contract, and it is therefore now too late for the Crown to say that it is *ultra vires*." My rejoinder to this is that in any case where a contract consists of a large number of distinct stipulations, and one of them is *ultra vires*, that any subsequent recognition of that contract by the parties would only be a recognition of it so far as it was valid, unless that recognition specially referred to the portion which was *ultra vires* for the purpose of ratifying it and so giving life and validity to that which was dead and invalid at its inception. Nothing of this kind has been done in the recognition which this contract has received by subsequent legislation relating to it, and the Chief Justice has produced no authority for the proposition that any subsequent recognition as a whole of a contract containing a number of stipulations, one of which is invalid, has the effect of validating the inoperative stipulation without special mention of it.

I now proceed to review the case of *In re Cornwall Mineral Railway Co.*, (reported in *Law Times Reports*, volume 48, page 41), which is quoted by the Chief Justice as an authority upon the question as to what expenditure can be properly included in "working expenses." The decision in that case turned upon the interpretation of sections 4 and 23 of "The Railway Companies Act, 1867," of the Imperial Parliament, and here at the outset we find a clear distinction between the facts upon which the Court was called upon to decide in that case and the facts in dispute between the Colony and the Tasmanian Main Line Railway Company. The 4th section of "The Railway Companies Act, 1867," exempts rolling-stock and plant used or provided by a railway company for the purpose of traffic on their railway from liability to be taken in execution at law or in equity, and, in lieu of the remedy by execution, provides that any person who has recovered any judgment against a Railway Company may obtain the appointment of a Receiver, and, if necessary, a Manager of the Undertaking of the Company, and that all moneys received by such Receiver or Manager shall, "*after due provision for the Working Expenses of the Railway, and other proper Outgoings in respect of the Undertaking, be applied and distributed under the direction of the Court in payment of the debts of the Company, and otherwise according to the rights and priorities of the persons for the time being interested therein.*" Section 23 of the same Act provides that "all money borrowed or to be borrowed by the Company on mortgage or bond or debenture stock under the provisions of any Act authorising the borrowing thereof, shall have priority against the Company and the property from time to time of the Company over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act." The Cornwall Mineral Railway Company, being in need of money, sold the bulk of their rolling-stock to the Yorkshire Railway Waggon Company for £30,000, and then hired it back for five years on the terms that the rolling-stock should become again the property of the Cornwall Company when the purchase money and interest had been repaid in the shape of rent. By this arrangement the Cornwall Company, who otherwise might have collapsed, were enabled to put themselves in funds for the payment of their debts, and to continue to work their line. A Receiver of the Cornwall Mineral Company's property was subsequently appointed under the "The Railway Companies Act, 1867," and the Waggon Company, who had purchased the rolling-stock of the Cornwall Company and had afterwards let it to the Cornwall Company on the terms above mentioned, brought in a claim to be paid the amount of rent due to them in respect of the rolling stock out of moneys in the hands of the hands of the Receiver, and some Debenture-holders, who had become such after the date of the sale and re-hiring of the rolling-stock, claimed to be paid in preference to the Waggon Company. The respective positions and conflicting rights of the Waggon Company and the Debenture-holders were thus pointedly described by Sir George Jessel in his judgment upon the contending claims:—"They," said he, referring to the Debenture-holders, "wish to take away something earned by the use of the rolling-stock belonging to the Waggon Company without paying them the price or the hire for the use of that rolling-stock." He then proceeds to ask, "Have the appellants any such legal right? That depends (said he) upon the Act of Parliament. Legal right they have none, independently of The Railway Companies Act, 1867;" and he then decides that the rent

of the rolling-stock in that case came within the meaning of the words "Working Expenses of the railway and other proper Outgoings in respect of the Undertaking," as used in section 4 of "The Railway Companies Act, 1867." It is difficult to conceive how any other decision could have been arrived at, or how any contrary contention could have been supported upon the facts before the Court; but it is equally difficult to me to conceive how the interpretation of the words "working expenses," as used in a special statutory provision for securing the payment out of, *and determining the priorities of claims against, a gross amount in the hands of a Receiver* can be made available for determining what is included in the words "work and maintain" as used in our contract with the Tasmanian Main Line Railway Company, or as usually understood in reference to railways in general. It is perfectly true that Sir George Jessel and Lord Justice Brett both say that the term "working expenses," as used in the statute they were then called upon to consider, included the sums paid for the rent of the rolling-stock used in the working of the railway in the case before them; but they were then interpreting the words of a statute the operation of which is confined to a special class of corporate bodies, for whose relations to their creditors the Legislature thought it necessary to make special statutory provisions by which the creditors were debarred from some of the ordinary legal remedies for enforcing payment of debts, and other remedies were provided in place of those taken away. It is also to be noted that Sir George Jessel takes the precaution to say that if the rent of the rolling-stock "were not included in the words *working expenses*, it would certainly be included in the words *proper outgoings*," and therefore the judgment in this case is really a decision upon the meaning of the whole statutory phrase "*Working Expenses of the Railway and other proper Outgoings in respect of the Undertaking*," and is a pertinent illustration of the well understood rule of "beneficial construction," by which the words of a statute will always be interpreted to include a matter clearly within its scope and object, although such matter would not be primarily embraced by the words in their ordinary and usual meaning. (*See Scott* v. *Legg*, *L.R.* 2, *Ex. D.*, *p.* 42, *and Maxwell on the Interpretation of Statutes*, *2nd edition*, *page* 84.) The provisions of "The Railway Companies Act, 1867," relate only to such railway companies as come within the definition of the word "Company" given in the 3rd section of the Act, which is "a Company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose.") All such Companies are under statutory obligations to provide specified travelling facilities to the public, and many of them are under obligation to work the railways they are authorised to construct, and in default of complying with that obligation forfeit all the rights and privileges conferred upon them by the Acts by which they are incorporated. I am not sure that this is not the case with all of them. But whether this is so or not, they are all subject to fines and penalties for not providing specified services to the public,—such as one train per day for third-class passengers at specified fares (*see* 7 and 8 Vict., ch. 85, sec. 6), and special trains for the conveyance of mails and troops, &c. when required by the Government. Hence we find Vice-Chancellor Parker, in the case of *Winch* versus *The Birkenhead, Lancashire ,and Cheshire Railway Company and Others* (reported in *Jurist*, volume 16, page 1035), saying:—"What is called working the line is the duty that is imposed by Act of Parliament upon them." Consequently, whatever would be expended by any Railway Company in order to work their line in a manner that would enable them to fulfil their statutory obligations so as to avoid forfeiture of their rights and privileges, or to escape fines and penalties, or (as in the case of the Cornwall Mineral Company) to enable them to make provision for the payment of their debts, would clearly be within the meaning of "Working Expenses and other proper Outgoings in respect of the Undertaking" as used in "The Railway Company's Act, 1867." The Tasmanian Main Line Railway Company are under a contractual, not a statutory, obligation to "work and maintain" the railway which they have constructed under their contract with the Colony. But before any particular kind of expenditure which the judicial decisions of the English Courts may at any time declare to be included in the words "working expenses" as used in "The Railway Companies Act, 1867," with regard to railway companies that are under statutory obligations to work their lines, can be held to be applicable to the Tasmanian Main Line Railway Company, it must previously be established that such expenditure is equally necessary for the Tasmanian Main Line Railway Company to enable them to fulfil their contractual obligations to work and maintain in an efficient manner the line of railway which is the subject of their contract with the Colony. The Chief Justice can therefore only cite the case of *In re Cornwall Mineral Railway Company* in confirmation of his interpretation of the words "work and maintain" upon the assumption that he has previously established the interpretation which he places upon those words, and therefore that case affords no assistance in settling the preliminary question as to the true meaning of the words "maintain and work" in the present case. To attempt to make an universal application of a judicial interpretation of particular words contained in a statute confined in its operations to a particular class of persons having special powers, functions, limitations, and obligations conferred and imposed upon them by that statute, or by other statutes directly referred to in such statute, would produce most extraordinary results, and it is contrary to the general principles governing the interpretation of ordinary deeds and documents.

The Chief Justice says he refrains from canvassing the results that might flow from my interpretation of the contract in order to test its reasonableness or otherwise; but whatever might be the results of that interpretation they would have to be accepted if the arguments by which I have supported it are sound, and I do not think that the results will be anything like so disadvantageous

to the Colony as the Chief Justice seems to hint, or as some portions of the press seem to imagine. But it is not necessary for me to enter upon that question in this Memorandum, and I now pass on to test the Chief Justice's interpretation of the contract by considering what are the relative positions of the Colony and the Company under it. The Chief Justice says the suggested difficulties and inconsistencies arising from the financial view of the contract as differently interpreted by him and myself cut both ways, but the preponderance of the argument to be derived from them seems to him to be strongly in favour of his interpretation. I will not repeat the illustrations I gave before the Court of some of the financial inconsistencies which flow from His Honor's interpretation of the contract, but will content myself with remarking that the counter inconsistencies urged by the Chief Justice against my interpretation can only arise if the railway fails to realise the manifest expectation of the parties, at the time the contract was signed, that it would be a profitable speculation to the Company, and in this connection I repeat here a portion of the judgment of Lord Denman in *Aspdin* v. *Austin*, (5, *A. & E.*, p. 84) which I quoted twice in my argument before the Court, viz.—"It is one thing for the Court to effectuate the intention of the parties to the extent to which they have even imperfectly expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the Court may deem fitting for completing the intention of the parties, but which they have either purposely or unintentionally omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligation to which the parties have bound themselves, and is of course quite unauthorised, as well as liable to create practical injustice in the application." As I said in my argument before the Court in quoting this judgment, if the parties to this contract have omitted anything from it that would have made it more complete, and have made a contract which produces unforeseen results in unexpected circumstances, those results must be accepted, and we cannot add anything to the contract to make it better even for the benefit of both parties. The position of the Company under the Chief Justice's interpretation of the contract is that they are bound to do all that they have done up to the present time in providing additional train service beyond four trains daily along the entire length of the line, and because they are bound to do it they are entitled to charge the cost of the additional rolling stock and station accommodation required for that additional service as expenditure incurred in maintaining and working the railway in accordance with the contract. But if this interpretation is sound it must confer upon the Colony a concurrent right to demand from the Company all that they have done in the way of providing the additional train service mentioned. In other words, whatever the Company are bound to do the Colony can require them to do. They cannot charge as part of the expenditure incurred in maintaining and working the Railway the cost of any additional rolling stock or station accommodation required for that which is a voluntary service on their part. But I can find no provision in the contract which confers upon the Colony the right to demand a local and suburban train service from Hobart to Glenorchy, and from Hobart to Bridgewater, and from Hobart to Brighton, such as is now supplied by the Company, and for the maintenance of which additional rolling stock is required. I designated these local and suburban services in my argument before the Court as independent speculations of the Company outside their contractual obligations, and I have no hesitation in saying that the Company are at liberty to keep separate accounts of the receipts and expenditure belonging to such local and suburban services, and to retain the whole of the profits arising from them, and that the Colony cannot claim to have such profits brought into account with the receipts and expenditure of the contract service for the purpose of reducing the annual payments of guaranteed interest. But, upon the Chief Justice's interpretation of the contract, the provision of these local and suburban trains is obligatory on the Company, and the Colony has had the right to demand them during the whole of the time they have been supplied. What, then, is the extent of the Colony's right to demand local and suburban train services? We have attached several branch lines of our own to the Company's line of railway, and are constructing others. If there are sufficient passengers and goods to be carried between Hobart and Launceston to fill the four daily trains mentioned in the schedule, exclusive of the additional passengers and goods which our branch lines of railway will bring to the junctions of those lines with the Company's railway, can the Colony call upon the Company to provide additional trains to carry the additional passengers and goods brought by our lines to the several junctions? Take, for illustration, the Fingal Line. We must be entitled to run a sufficient number of trains from St. Mary's to Conara every day to carry whatever passengers and goods offer themselves to be carried on that line, and we must be entitled to start those trains from St. Mary's at hours convenient to our passengers and to our Railway Department. If those trains arrive at the Conara junction at such hours as will necessitate the passengers for Hobart waiting half a day, or having to pass the night at Conara, in order to catch one of the two trains which the Company are bound to run daily from Launceston to Hobart in accordance with the schedule of the contract, can we, in order to obviate this inconvenience to these passengers from St. Mary's, call upon the Company to provide a special train to run from Conara to Hobart to take these passengers to that city, and another train to run from Conara to Launceston to convey the passengers that wish to be carried to the last mentioned city? I can find no such powers conferred upon the Colony by the contract, and I am inclined to think that such consequences of the Chief Justice's interpretation of the contract will come as a new revelation to the Company as much as to the Colony; and if we should attempt to act upon that interpretation it is quite within the range of probability that the Company would then find it convenient for them to repudiate it, and seek to escape from it. If the question of hardship is to be of any weight in deciding which interpretation of the contract is the more reasonable, then

we have before us the grave proposition that with the growth of the Colony, and the establishment of branch lines by the Government running into the Company's railway, the Colony has it in its power to put such burdens upon the Company as I venture to assert could never have been contemplated by the parties to the contract at the time it was signed, and which would most effectually prevent the contract ever becoming a profitable speculation to the Company; because, whilst we can demand one train service after another from any one station upon the line to any other station as soon as there is traffic to be carried along that portion of the line, our obligation to assist the Company in providing the new rolling stock and station accommodation required for that train service is inexorably limited to whatever margin there may be between such profits as the Company with these increased burdens may make and the sum of £32,500 per annum. Such are the results of the Chief Justice's interpretation of the contract, and I must say that to me they are most astonishing for they involve the startling proposition that the Company, when they signed the contract, instead of taking upon themselves a definite and limited obligation in consideration of a definite and limited *quid pro quo*, accepted the promise of a strictly defined and limited remuneration for an undefined and unlimited burden, and that with the lapse of time the rights and privileges of the Colony under the contract may enlarge and expand to unforeseen dimensions without the slightest accompanying increase of reciprocal liability.

The Chief Justice asked me in the course of my argument before the Court if I contended that the Company might leave on the roadside any passengers and goods which four trains would not accommodate; and according to His Honor's interpretation of the contract, such an act on the part of the Company would be a breach of the contract. But I am informed that the Company have frequently failed to find accommodation for all the passengers who wish to travel from Hobart and intermediate stations upon the local and suburban lines on holidays such as race days, regatta days, &c., and if these local and suburban services are compulsory on the part of the Company, then on every occasion on which they have failed to carry all the passengers that presented themselves they were guilty of a breach of their contract. This, I believe, will be another new revelation to the Company, but I cannot see how it is to be avoided upon His Honor's interpretation of the contract.

In the concluding portion of his judgment, the Chief Justice says of his interpretation of the contract, "It accepts the plain meaning of the language used, and does not require, as the Crown's new construction does, the omission of parts of the contract, viz., words in clause 6 and in the schedule to the contract as being *ultra vires*." I have already said that it was never my intention to contend that any part of the schedule was *ultra vires*. On the contrary, the main burden of my argument was that the particular provisions of the schedule overrode all general expressions in the contract that might be inconsistent with those provisions; and I have endeavoured in this Memorandum to show that my interpretation of the contract is not dependent on the excision of any part of it. I now contend that my interpretation creates no conflict between the schedule and the contract, or between the contract and the Acts relating to it, and that it accepts all the language used in the contract and in the Acts according to its usual and well understood meaning. But how is the Chief Justice's interpretation arrived at and supported? It is primarily based upon the general language of the stipulation contained in the 2nd section of "The Main Line of Railway Amendment Act," (34 Vict. No. 13), viz.—"Such guarantee shall continue for thirty years from the date on 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 it disregards the particular provisions of the schedule to the contract, or expands them to include all that the general language of the statutory stipulation would include, contrary to the fundamental maxim of interpretation that general covenants and expressions are restricted by particular descriptions of the same subject-matter or obligation in the same instrument; and the authority quoted for adopting this course is a case in which the general covenant relied upon by the plaintiffs was held to be restricted and limited in its operation by the subject-matter to which it related and by the particular result which the covenant was intended to secure. It gives to the word "profit" a meaning contrary to that which it has in its ordinary usage in the commercial world, and which has been recognised and adopted as its true and proper meaning by the Courts of Law in England in numerous judicial decisions. It gives to the word "maintenance" a meaning contrary to that put upon it by Sir George Jessel when he was called upon to specially consider it in connection with a railway contract, and it adopts the interpretation given to the phrase "working expenses" in a case in which it became necessary to consider its meaning as part of a larger phrase inserted in a statute passed for special purposes in relation to a particular class of persons and their transactions. I cannot think that an interpretation so reached and so supported can be correct, and I therefore advise the Cabinet that an appeal should be made from the Judgment of our Supreme Court in the matter to Her Majesty in Council.

It is my intention to submit a copy of this Memorandum to Mr. John M'Intyre (who was associated with Dr. Madden and myself in the conduct of the case for the Crown), and to invite him to make such observations thereon as to the validity of its contentions as he shall think fit, and upon receipt of his observations I shall forward them to the Premier for his perusal.

A. INGLIS CLARK.

Macquarie-street, Hobart, 30th August, 1889.

MEMORANDUM FOR THE HONORABLE THE ATTORNEY-GENERAL.

Re THE TASMANIAN MAIN LINE RAILWAY COMPANY, LIMITED, *versus* THE QUEEN.

I CONCUR with the Attorney-General in his dissent from the interpretation put upon the contract by Dr. Madden at the trial as to the extent of the Company's obligations thereunder. Indeed, I doubt whether Dr. Madden would now be prepared to uphold that interpretation. I know that at a consultation held subsequently to the trial he appeared to be impressed with the view put forward by the Attorney-General as to the true extent of the Company's liability with regard to train service, which view was afterwards fully elaborated during the argument before the Full Court on the application for a new trial.

I have perused and carefully considered the divergent interpretations of the contract by the Chief Justice and the Attorney-General. In regarding the different constructions of the language contained in the Acts and contract, I have come to the conclusion that no interpretation is possible that will be absolutely consistent throughout, and reconcile all differences of expression and apparent inconsistencies. The question is, which of the two interpretations is, on the whole, the more reasonable one, assuming both of them to be fairly deducible from the language employed? To use the words of the Chief Justice in his address to the Jury at the trial of the cause, "If one interpretation gives us that which is reasonable and another that which is unreasonable, the rule is to give the more reasonable interpretation."

I cannot help feeling that the construction adopted by His Honor in his (if I may be permitted to say so) able and powerful judgment refusing the *Rule Nisi*, makes the contract a more reasonable and liberal one in some respects than that which the Attorney-General's contention would establish, although it must be admitted that it involves the recognition of a duplicate contract, and applies a different set of principles to the additional train service supplied by the Company to that which the contract attaches to the minimum service. It imposes on the Company the duty of providing all that is reasonably necessary to afford station accommodation and facilities for traffic, to whatever extent such traffic may increase, *along every portion of the line*. It insures this benefit to the Colony during the whole term of the contract. The expenditure in respect thereof is chargeable to maintenance and working expenses, and comes out of the revenue of the railway, but is strictly limited to what is reasonable and necessary for existing traffic. In the words of the Chief Justice during the argument, "the only expense they can incur is that which is reasonably necessary under the contract to comply with the requirements of traffic. They cannot go beyond that." The argument that upon this construction the Company are simply enabled to improve their line with other people's money, that is to say, with the moneys of the Colony, and that in the event of the Crown exercising its option of purchase it would be buying over again what it had already paid for, is met by the Chief Justice with the reply that the money never belonged to the Crown. "For if (he says) by the contract this money is to be applied in these works this was part and parcel of the original consideration between the parties, and the money never became the property of the Crown."

On the other hand, the interpretation placed upon the contract by the Attorney-General, although undoubtedly most able and ingenious, and put forward with great force, is a much narrower and more rigid one than that which the Chief Justice has held to be the true construction. According to the Attorney-General's contention the obligation of the Company is limited to maintaining and working the line just as when it was first opened for traffic. The Colony can compel them to do nothing more, however insufficient the amount of rolling-stock, two daily trains each way, and station accommodation may be to meet the exigencies of increasing traffic. This is all that the Company is bound to do by the contract, and all that can under any circumstances be required of them. Anything beyond this is in the absolute discretion of the Company, and it is assumed that self-interest will naturally lead them, at their own cost, to supply whatever extra rolling-stock, &c. may be necessary from time to time to deal with the increase of traffic. As soon, however, as such additional stock is supplied, the Company become entitled to deduct the cost of maintaining and working it out of the revenue of the line. But the obligation to maintain and work relates only to the original equipment of the line as taken over by the Colony.

The question is, which of these two widely differing interpretations is the true one?

With every deference to the opinion of the Chief Justice, it appears to me that in his judgment he gave too great effect to the words of a clause (No. 6) of the contract, which clause has no obligatory force or effect, and passed too lightly by one of the main arguments for the Crown, namely, the limiting and controlling power of the schedule to the contract. The arguments

of the Attorney-General on both these points were, in my opinion, most cogent ones. The case cited by His Honor (*The West London Company* v. *The London and North-Western Company*, 11 *C.B.*, 41) is, I think, distinguishable from the present case. In the case cited there was no schedule to control the contract; in the case before me there is a schedule, which, to my mind, makes all the difference. The case, *In re Cornwall Mineral Railway Co.*, 48 *L. T.* 41, also cited by the Chief Justice, is, I think, distinguishable, and for the reasons given by the Attorney-General in his Memorandum. I agree with the Attorney-General in his construction of Section 5 of 46 Victoria, No. 43, and share in his view that neither that Act nor the contract contains any new definition of the term "profit." At the same time it is to be observed that if "maintaining and working" are to receive the construction put upon them by the Chief Justice, that is to say, if they include whatever is necessary to afford station accommodation and facilities for traffic from one end of the line to the other, the expenditure in respect thereof must be deducted from the revenue before any question of "profits" can arise, whatever definition that word is to receive.

It was contended, on the part of the Crown, upon the application for a rule *nisi*, that the Company would be fulfilling their contract if they ran four daily trains, "working at the utmost capacity which the science of the day says an engine should carry upon that line," even if half the passengers and goods tendered along the route had to be left behind. The clause in the schedule upon which this argument is based is as follows:—"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."

It is arguable that the words "at least" in this clause go to show that the obligation of the Company is not limited to the running four trains a day and no more. That its true meaning and effect are that, while the Company are bound to run at least not less than four daily trains, even though they should at any time prove more than sufficient for the existing traffic, the clause does not in any way limit the obligation upon the Company of running as many more trains as may be necessary to work the line in an efficient manner. That, while the schedule constitutes four trains a day the minimum number which the Company must run, even if they should go empty, it does not make that the maximum number which the Company can be compelled to put on the line each day. That this will depend entirely upon the amount of traffic that is presented from day to day. If this argument can be supported it would dispose of a large part of the case set up by the Crown, unless it should be then open to the Crown to contend that the additional train service must be supplied upon the same conditions, and surrounded by the same rights and obligations with regard to both parties, as the minimum service mentioned in the contract. This would, however, be falling back upon the principle of Dr. Madden's original contention.

I do not think it necessary to extend my observations to any length. I can add nothing to the exhaustive memorandum of the Attorney-General, which, as it appears to me, comprises every argument of any weight that can be adduced in support of the case advanced on behalf of the Crown. I am bound to say that, hard and inelastic as is the construction now put upon the contract by the Attorney-General, it appears to me to have the merit of reasonable consistency throughout, and to give more or less effect to the enabling Acts and the contract. But while I recognise the force of many of the positions taken up for the Crown (the majority of which were fully discussed and considered by the Attorney-General and myself in consultation prior to the argument), yet, looking at the case as a whole, with all that is to be said both for and against it, I do not feel confident that it would be upheld on appeal. I think, however, that there is sufficient doubt as to the correctness of the view taken by the Chief Justice with regard to the construction of the contract to warrant an appeal to the Privy Council, and, as it is of great importance to the Colony that the matter should be authoritatively decided once and for all, I think that an appeal should be made accordingly.

The second ground upon which the application for a new trial was refused was, that the interpretation put upon the contract by the Crown on the argument before the Full Court, differed from that set up on behalf of the Crown at the trial of the cause. The first ground upon which the application for a new trial was made was "Misdirection of the Jury by the presiding Judge on the interpretation of the contract on which the action was founded, and particularly of the words 'maintain and work' therein." The alleged misdirection was with regard to the meaning of the words "maintain and work." On this point I do not think there was ever any difference of opinion between the Attorney-General and Dr. Madden as regarded the issue before the Court. I concur with the Attorney-General in his view of the matter, and advise that the application for a new trial was wrongly refused on the second ground. Moreover, I think the Privy Council would endeavour, if possible, to decide the substantial question at issue between the Crown and the Company.

JOHN M'INTYRE.

Attorney-General's Office, 30th August, 1889.

MEMO.

In forwarding Mr. M'Intyre's Memorandum to the Premier, I desire to make a few observations upon what I take to be the intention and effect of the insertion of the words "at least" in the section of the Schedule which requires a minimum service of four trains daily. My attention was directed to these words by Mr. Justice Dodds, in the course of my argument in support of the application for a new trial, but I had not then considered what might be the full force and effect of them, and did not then discuss the question at any length. I now desire to say that I think that the utmost force that can be given to them is to interpret them as permitting the Company to provide more than the minimum train service mentioned in the Schedule and to charge the cost of maintaining and working that additional train service as part of the "expenditure for and in respect of the maintenance and working of the railway." But, in order to entitle the Company to include the cost of maintaining and working any additional train service as part of the general cost of maintaining and working the railway under the contract, such additional train service must be service between the extreme termini of the line, that is Hobart and Launceston, and must not embrace local or suburban services, and it must be supplied upon the same conditions, and subject to the same rights and obligations as regards both the Colony and the Company, that the contract attaches to the provision of the minimum train service mentioned in the Schedule. I also take this opportunity to draw attention to that portion of my argument in support of the application for a new trial in which I was asked by Mr. Justice Dodds if the Company were not bound to provide additional carriages upon the demand of the Governor. I replied that the Company were bound to do so, but I did not make it as clear as I should have done that I regarded the power of the Governor to demand enlarged trains as limited by the extent to which the line was to be originally equipped under the contract. I believe I have made this sufficiently clear in my Memorandum, but I desire to explain what might appear to be an inconsistency between the answer I gave to Mr. Justice Dodds in reference to this point and the position which I have attempted to maintain in the Memorandum.

A. INGLIS CLARK.

The Hon. the Premier.

WILLIAM THOMAS STRUTT,
GOVERNMENT PRINTER, TASMANIA.