1896.

NEW ZEALAND.

NEW ZEALAND MIDLAND RAILWAY ARBITRATION:

PRELIMINARY PAPERS, STATEMENTS OF CLAIM, AWARD, ETC.

Laid upon the Table by the Hon. R. J. Seddon, with the Leave of the House.

NOTICE OF APPOINTMENT OF ARBITRATOR BY NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED).—FIRST REFERENCE.

To the Right Honourable the Earl of Glasgow, Governor of the Colony of New Zealand, or other the Governor for the time being of the said colony, on behalf of Her Majesty the Queen.

TAKE notice that certain disputes, differences, and questions having arisen touching the construction, meaning, and effect of a certain contract made and entered into on the 3rd day of August, 1888, between Her Majesty the Queen of the one part and the New Zealand Midland Railway Company (Limited) of the other part, and the rights of the said company thereunder, and otherwise in relation to the matters set forth therein, the New Zealand Midland Railway Company (Limited) desires that all such disputes, differences, and questions be referred to arbitration, in accordance with the provisions of clause 47 of the said contract: And also take notice that the New Zealand Midland Railway Company (Limited) has this day appointed Sir Bruce Lockhart Burnside, of Lincoln's Inn, Knight, one of Her Majesty's Counsel, late Chief Justice of Ceylon, to be Arbitrator for the purpose of such arbitration; and requires you to appoint an arbitrator for the like purpose within three months from the service of this notice: And further, that if you shall refuse or neglect to appoint an arbitrator within the time aforesaid, that the said Sir Bruce Lockhart Burnside will proceed to hear and determine the matters in difference as if he were an arbitrator appointed by both parties for that purpose.

Dated this 30th day of November, 1894.

Sealed with the Common Seal of the New Zealand Midland Railway Company (Limited) in the presence of—
ÆNEAS R. MCDONNELL, Secretary.

HENRY V. HART DAVIS,
WALTER CHAMBERLAIN, } Directors.

APPOINTMENT OF ARBITRATOR BY THE CROWN.—FIRST REFERENCE.

WHEREAS disputes, differences, and questions have arisen under and arising out of the contract dated the 3rd day of August, 1888, made between Her Majesty the Queen of the one part and the New Zealand Midland Railway Company (Limited) of the other part: And it has become requisite and necessary to appoint an arbitrator on behalf of Her said Majesty pursuant to the provisions of clause 47 of the said contract:

Now, therefore, I, David, Earl of Glasgow, G.C.M.G., Governor of the Colony of New Zealand, do hereby appoint the Honourable Sir Charles Lilley, Knight, late Chief Justice of the Colony of Queensland, to be Arbitrator in respect of the said disputes, differences, and questions on behalf of Her said Majesty.

Dated at Auckland, this 28th day of March, 1895.

Signed by His Excellency the Governor, and sealed with the seal of the Colony of New Zealand, at the Government House, at Auckland, in the presence of—
E. H. M. ELLIOT, Major,
Pro Secretary to His Excellency the Governor.

GLASGOW, Governor.

NOTICE OF APPOINTMENT OF ARBITRATOR BY NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED).—SECOND REFERENCE.

To the Right Honourable the Earl of Glasgow, Governor of the Colony of New Zealand, or other the Governor for the time being of the said colony, on behalf of Her Majesty the Queen.

TAKE notice that the New Zealand Midland Railway Company (Limited) disputes the right of the Governor of the Colony of New Zealand, on behalf of Her Majesty the Queen or otherwise, to take possession of or assume the management of the said Company's railway, its rolling-stock, or other property of the Company, or any part thereof, and maintains that in taking possession of the said railway and other property of the said Company, of which possession has lately been taken, you have acted illegally, and that consequently further disputes, differences, and questions, in addition to the disputes and differences which had arisen at the date of the notice to appoint an arbitrator, delivered to you by or on behalf of the New Zealand Midland Railway Company (Limited), dated the 30th day of November, 1894, have arisen touching the construction, meaning, and effect of the contract made and entered into on the 3rd day of August, 1888, between Her Majesty the Queen of the one part, and the said New Zealand Midland Railway Company (Limited) of the other part; and in particular a question as to whether the taking possession of the said railway and other property, or any part thereof, and whether or not the assumption of the management of the said railway by you on behalf of the Queen or otherwise was or is lawful and authorised by the said contracts and the Acts therein referred to; and, if not, as to the damages or compensation the said Company is entitled to by reason of possession having been taken as aforesaid, or by reason of anything done by you on behalf of Her Majesty the Queen or otherwise in connection therewith, and also as to the footing upon which you on behalf of Her Majesty the Queen or otherwise should account to the said Company, and as to when and upon what terms possession of the said railway and property, or any part thereof, ought to be restored to the said Company, and generally as to the rights of the said Company under the said contracts and Acts in the events which have happened: And further, take notice that the New Zealand Midland Railway Company (Limited) desires that all such disputes, differences, and questions be referred to arbitration in accordance with the provisions of clause 47 of the said contract: And also take notice that the New Zealand Midland Railway Company (Limited) has this day appointed Sir Bruce Lockhart Burnside, Q.C., to be Arbitrator for the purpose of such arbitration, and requires you to appoint an arbitrator for the like purpose within three calendar months from the service of this notice: And further, that, if you shall refuse or neglect to appoint an arbitrator within the time aforesaid, that the said Sir Bruce Lockhart Burnside will proceed to hear and determine the matters in difference as if he were an arbitrator appointed by both parties for that purpose.

Dated the 13th day of July, 1895.

Sealed with the seal of the New Zealand Midland Railway Company (Limited).

HENRY V. HART DAVIS,
C. SHIRREFF B. HILTON, } Directors.
ÆNEAS R. MCDONNELL, Secretary.

APPOINTMENT OF ARBITRATOR BY THE CROWN.—SECOND REFERENCE.

WHEREAS by appointment, dated the 28th day of March, 1895, the Honourable Sir Charles Lilley, Knight, late Chief Justice of the Colony of Queensland, was appointed Arbitrator on behalf of Her Majesty the Queen in respect of certain disputes, differences, and questions alleged to have arisen under and arising out of the contract dated the 3rd day of August, 1888, made between Her said Majesty the Queen of the one part and the New Zealand Midland Railway Company (Limited) of the other part: And whereas it is alleged by the said New Zealand Midland Railway Company (Limited) that certain other differences, disputes, and questions have arisen since the said 28th day of March, 1895, under and arising out of the said contract: And whereas the said New Zealand Midland Railway Company (Limited) has appointed an arbitrator on its behalf in respect thereof, and it has thereby become requisite and necessary to appoint an arbitrator on behalf of Her said Majesty:

Now, therefore, I, David, Earl of Glasgow, G.C.M.G., Governor of the Colony of New Zealand, do hereby appoint the said Honourable Sir Charles Lilley, Knight, to be Arbitrator in respect of the said alleged last-mentioned disputes, differences, and questions on behalf of Her said Majesty.

Dated at Wellington, this 21st day of September, 1895.

Signed by His Excellency the Governor, and sealed with the seal of the Colony of New Zealand, at the Government House, at Wellington, in the presence of— GLASGOW, Governor.

G. GATHORNE HARDY,
Assistant Private Secretary to His Excellency.

PARTICULARS OF CLAIM DELIVERED BY THE COMPANY.

IN ARBITRATION.—THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED) AND HER MAJESTY THE QUEEN.

THE New Zealand Midland Railway Company (Limited) refers to arbitration, as provided by clause 47 of the contract dated the 3rd day of August, 1888, and made between the parties, all matters

arising prior to the 14th day of January, 1895. The acts and defaults complained of are those of the Executive of the Colony of New Zealand, acting for the Queen by and through the Governor of the colony, or by and through the Minister for Public Works.

The Company claims as follows:—

1. That the undertaking of the Company, being work to be remunerated in part by land, as provided by clause 16 of the contract, the Queen, contrary to the provisions of the said contract, refused and prevented the exercise by the Company of its rights of selection over large areas of land within the authorised area.

2. That if any lands were properly reserved under subclause (*c*) of clause 16, then the Company was hindered and prevented in the exercise of its rights under clause 18, by being refused the right to the timber on such lands.

3. That the Queen has, in contravention of the contract, permitted and authorised the destruction and the removal of timber on lands available for selection, and thereby depreciated the value of such lands.

4. That the Queen, in contravention of the contract, refused to give effect to the requests of the Company, under clause 33, to sell or let lands within the authorised area in the Nelson and Westland Land Districts on the western side of the main range of mountains.

5. That the remuneration of the Company, being to the extent of £1,250,000 "B 1 value" in land (as the work of construction should proceed), the Queen (by and through the Parliament of the colony), by greatly increased and graduated taxation on land, imposed subsequent to the date of the contract, and without any exception in favour of the lands over which the Company had the right of selection, materially reduced the consideration of the contract and destroyed confidence in the undertaking of the Company as a commercial enterprise.

6. That the Queen, by withholding for an unreasonable time consent to the deviation of the railway-line from the western to the eastern side of Lake Brunner, and to the substitution of the incline for the tunnel line at Arthur's Pass, delayed and prevented the Company from proceeding with the works under the contract.

7. That the Queen, by further withholding for an unreasonable time consideration of the application of the Company for an extension of time, under clause 42 of the contract, prevented the Company from raising the capital necessary to complete the railway and to perform its other obligations, and to realise the benefits and rights conferred on it by the contract.

8. That the Queen, in derogation of the contract, by and through the Executive of the Colony, and particularly by the false and defamatory statements of the Minister for Public Works in October, 1892, before a Select Committee of the House of Representatives (which statements became a part of the public records of the colony), made it impossible for the company to raise the capital necessary to complete the railway and to perform its other obligations, and to realise the benefits and rights conferred on it by the contract.

9. That the Company being formed for the purpose of constructing a railway on the system of land-grants, as provided by "The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884," and as expressed in the contract between the parties, and being thus known to the Queen as a Company which would have to raise money from time to time by share or debenture capital, or both, to enable it to carry out the contract, was, by reason of the premises, prejudiced and prevented from raising the capital necessary to complete the railway and to perform its other obligations, and from realising the benefits and rights conferred on it by the contract.

That, by and in relation to the foregoing matters, the credit of the Company has been destroyed, and consequently it has been prevented from completing the railway, and that thereby it has lost the whole of the share-capital subscribed, together with the profits reasonably to be expected thereon, and has lost the whole of the debenture-capital raised and expended, with interest thereon, and also other moneys and credits, amounting to the sum of £1,584,900, which sum the Company accordingly claims to recover from the Queen.

These particulars are in respect only of the matter in dispute and difference existing prior to and on the 14th January, 1895, and do not include the claims of the Company in respect of matters in dispute or difference arising since that date, and do not include the claim of the Company arising out of the seizure of the railway on the 25th May, 1895. All matters arising since the 14th January, 1895, up to the 13th day of July, 1895 (including the Company's claim for the seizure of the railway) the Company have, under clause 47 of the contract, submitted to arbitration under the notice dated 13th July, 1895.

(Delivered 23rd November, 1895.)

STATEMENT OF RESPONDENT'S CASE.

COLONY OF NEW ZEALAND.

In the Matter of an Arbitration between THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED), Claimant, and HER MAJESTY THE QUEEN, Respondent.

THE respondent, by Hugh Gully, Crown Solicitor for the Wellington District, says:—

I.—1. In the year 1884 the Parliament of New Zealand passed "The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884." By that Act several advantages were proposed and offered by the colony to such company as should undertake the construction of the railways therein specified. By section 7 of that Act it was provided that the Governor should cause an area of Crown land for a distance not exceeding fifteen miles on each side of the proposed line to be withdrawn from sale; that such lands should be surveyed into

rectangular blocks; and that the company, by alternate choice, should obtain land having one-half the frontage to its line. By section 8 it was provided that, should there not be sufficient Crown land adjoining the line, then other land should be set aside in places which would be specially benefited by the construction of the railway; and by the same section, subsection (5), it was provided that the company should be entitled to any coal found upon the land comprised in its grants. By subsections (8) and (9) of section 8, lands described in the Schedule to "The Westland and Nelson Coalfields Administration Act, 1877," and lands then used for mining purposes, on which were known gold-workings, were excepted, and declared not to be Crown lands for the purposes of that Act.

2. A contract under the Act of 1884 was, on the 17th day of January, 1885, entered into between Her Majesty, of the one part, and several gentlemen therein named of the other part, and was laid before the General Assembly in the session of 1885.

3. On the 30th day of April, 1886, this original contract was, with the consent of the Governor of the colony, assigned to the claimant Company.

4. The Amendment Act of 1886 was then passed, authorising the Governor to enter into a new contract with the claimant Company. In the third section of the Act of 1886, maps were referred to as defining the part of the colony within which the claimant Company was entitled to select lands to be granted to it.

5. In the year 1887 "The Midland Railway Contract Act, 1887," was passed, authorising the Governor to enter into a contract with the claimant Company, and providing by statute for the provisions of such contract, and declaring that such contract should operate as a substitute for the original contract. Pursuant to this Act a contract was duly executed, bearing date the 3rd day of August, 1888, between the claimant Company and Her Majesty.

6. Under the said contract the claimant Company was, as therein appears, under an obligation to Her Majesty to construct the works therein specified "with all convenient speed and within the term of ten years computed from the 17th day of January, 1885, or within such further time after the expiration of that period as might be allowed in that behalf under the said contract."

7. No such further time has been allowed by Her Majesty or the Governor under the said contract.

8. The said term of ten years expired on the 17th day of January, 1895, and at that time the claimant Company had refused, neglected, or failed to perform its obligations to Her said Majesty as set out in the said contract: And in particular the respondent says that under the said contract the claimant Company was bound within the period aforesaid to construct the whole of the work specified in clause 2 thereof; whereas, in fact, the claimant Company has refused, failed, and neglected to construct the greater part of such works, as appears in the succeeding paragraphs hereof.

9. The mileage of the railway actually constructed by the claimant Company, as compared with the mileage which it was the duty of the claimant Company to construct under the said contract, shows that the claimant Company had on the said 17th day of January, 1895, actually constructed and completed 75 miles of the railway, as against its obligation to construct 235 miles or thereabouts.

10. The sections of the said line of railway which have been left unconstructed would be proportionately much more expensive in construction than the parts already completed.

11. It is a fact that the estimated total of the expenditure of the claimant Company under the whole of the works is the sum of £2,500,000 as shown in the contract, and it is probable that the actual cost of construction would exceed that sum. Nevertheless the sections of the said railway constructed and completed at the date of the expiration of the contract time only represent, upon the basis of the estimate provided for by the contract, a sum of £470,300.

12. The respondent therefore avers that by virtue of the matters hereinbefore alleged the claimant Company has failed to perform at least four-fifths of the works which under the said contract it undertook to construct.

13. The plan hereunto annexed, marked "A," shows by way of comparison the works contracted to be done with the works actually constructed at the time of the expiration of the contract.

14. The respondent further avers that the claimant Company not only failed to perform its contract, but has notified an intention to abandon a substantial part of the said works, to wit, that portion of the said railway-line which extends from Reefton to Motueka, a distance of over ninety-four miles; and, further, that in pursuance of such intention the claimant Company in the year 1892 petitioned Parliament, alleging certain grievances against the colony; and, upon inquiry before a Parliamentary Committee in that behalf, appointed counsel for the claimant Company made the following explicit statement: "The Company is at the end of its finance. To say that the contract is in existence for two years and a half is, in the sense Mr. Seddon says it, correct. But it is not so in the sense that I should use the words. The Company is without funds to complete its contract: the Company cannot raise the funds to complete its contract without some modification of the contract. It is true that the Company has said that it could not raise the funds without the determination of the question of the incline, and of the question of extension of time; but the Company has not said that the settlement of those two questions alone would enable it to raise the necessary funds. The real question which we have brought, and desire to bring before Parliament through this Committee, is this: Will you make a modification in the contract? because if not, it is impossible for us to carry it out. We have not the funds, and without some modification we cannot procure the funds. Therefore, if the railway is to be carried out by this Company, give us some modification. We have made some suggestions: we are prepared to consider any others that may be offered. But we desire to find a ground where we may meet the Government, and ascertain what modifications the Government are willing to consent to, if any.

If none, then the matter is disposed of by this, that the Company is without the funds to enter into further obligations, and can only provide funds to meet the interest on the debentures for the period of the contract."

This statement was, however, made subject to a reservation of such legal rights as the claimant Company might have (if any).

15. The claimant Company by its attorney and general manager in New Zealand has repeatedly, both before and after the hearing of the said petition, unequivocally stated the intention of the claimant Company not to proceed with the said works specified in paragraph 14 of this statement, except upon terms and conditions not included in the said contract

16. The respondent alleges that the true reason why the claimant Company has failed to perform its obligations under the said contract is that it has been unable or unwilling to provide the funds required for the completion of the works.

17. Owing to such inability or unwillingness the claimant Company has from time to time—while continuing to act under the said contract as being in force—made application to Parliament for concessions under and modifications of such contract. Such modifications and concessions were before the aforesaid Parliamentary Committee in 1892, and certain further proposals were in like manner brought before Parliament in 1893 and 1894. Some of the modifications and concessions asked for by the claimant Company have been refused, but the following concessions have been made, and accepted by the claimant Company under the contract—namely:

(1.) A deviation applied for by the claimant Company, whereby the claimant Company was permitted to construct its line of railway on the eastern side of Lake Brunner instead of on the western side.

(2.) The construction of an incline line instead of a tunnel at Arthur's Pass.

18. The concessions mentioned in the last preceding paragraph hereof were made upon the application by the claimant Company in its own interest, and resulted, or would result if the work were proceeded with, in a large reduction of the cost to the claimant Company of the construction of its works. The claimant Company's own estimate of the saving upon the substitution of the incline line at Arthur's Pass is the sum of £559,881.

19. The respondent further alleges that, by virtue of the matters hereinbefore specified, and upon the further grounds hereinafter set out, the claimant Company is estopped from contending that there has been any breach by the respondent excusing the non-performance by the claimant Company of its obligations under the said contract.

20. That, nevertheless, upon the aforesaid Parliamentary petition for relief in 1892, the claimant Company contended that the respondent had committed breaches of the said contract, *inter alia*:—

(1.) By reserving an aggregate area of 184,000 acres as reserves under and by virtue of the power in that behalf contained in sub-clause (*c*) of clause 16 of the said contract, although the total area of 750,000 acres therein specified had not been exceeded. (This area has since 1892 been materially increased.)

(2.) By delaying in acceding to certain applications under clause 33 of the said contract.

The other grievances alleged on the hearing of the said petition were not founded upon any alleged breach of contract or legal obligation, but upon alleged claims upon the colony for concessions and modifications of the contract.

21. As to the matters specified in sub-paragraphs (1) and (2) of the last preceding paragraph hereof the respondent says:—

(1.) That there has been no breach by the respondent of any legal obligation or duty in respect of such matters;

(2.) That the claimant Company has continued up to the end of the said contract time to insist upon the said contract as subsisting, and in particular has continued to select land thereunder, the last of such selections having been made on the 16th day of January, 1895, the day before such contract time expired.

22. On the 14th day of January, 1895, the claimant Company gave notice of its desire to arbitrate under the provisions of clause 47 of the said contract, and of the appointment of an arbitrator on its behalf.

23. On the 27th day of March, 1895, the respondent, by the Crown Solicitor, notified to the claimant Company that, as the time for performance of the said contract had expired, and as the claimant Company had failed or refused to perform its obligations thereunder, the claimant Company had broken, abandoned, and rescinded the said contract, and was not entitled to claim any right, benefit, or privilege thereunder; and that the proceedings in pursuance of the claimant Company's notice to arbitrate must be taken to be subject and without prejudice to the respondent's notification.

24. That thereafter, on the 28th day of March, 1895, the respondent, by the Crown Solicitor aforesaid, notified the appointment of an arbitrator, subject to the consequences of the breaches of contract by the claimant Company, and without prejudice to the contention that the claimant Company was barred by its own breaches and non-performance of the provisions of the said contract.

25. The consequences of the failure by the claimant Company to perform its contract have been:—

(*a.*) The loss of the benefit which would have accrued to the colony had the said railway contracted to be built by the claimant Company been duly completed;

(*b.*) The locking up during a period of ten years of an area of upwards of 5,000,000 acres of Crown land, reserved for the purposes of selection by the claimant Company, which special area is shown upon the plan "B 1" annexed to the said contract.

(*c.*) The loss to the colony of the land-grants already made to the claimant Company upon the faith of its said contract, which said land-grants amount in the aggregate to an area of 373,677 acres.

26. The respondent submits that the claimant Company, not having performed the contract, cannot in law maintain any claim thereunder, and that, further, the said arbitrators have no jurisdiction to make any award thereunder.

II.—27. On the 25th day of May, 1895, under and by virtue of the provisions of "The Railways Construction and Land Act, 1881," under warrant of the Governor of the colony, possession of the said line of railway was taken, and the management thereof assumed on behalf of the respondent.

28. On the 6th day of September, 1895, the claimant Company gave notice of its desire to submit to arbitration all questions therein mentioned arising out of such taking possession as aforesaid, under the provisions of clause 47 of the said contract, and further gave notice of the appointment of an arbitrator on its behalf. The said notices are lodged with the arbitrators herein.

29. On the 31st day of July, 1895, having heard by cablegram of the claimant Company's intention to serve the notice lastly hereinbefore mentioned, and again on the 21st day of September, 1895, after service in the colony of such notice, the Crown Solicitor aforesaid notified to the claimant Company that the respondent denied the right of the claimant Company to arbitrate upon the subject-matter of the said notice, upon, *inter alia*, the following grounds:—

(*a.*) That the said notice disclosed no valid ground for invoking the arbitration clause in the said contract, inasmuch as—

(1.) The claimant Company had entirely failed in its obligation to the colony in carrying out its contract work within the contract time;

(2.) The taking possession by the Governor under the statutory authority of "The Railways Construction and Land Act, 1881," excluded any right to proceed to arbitration under the contract:

(*b.*) That no dispute had arisen touching the meaning and effect of the contract, or otherwise coming within the scope of clause 47 thereof:

(*c.*) That the legality of such taking possession depends upon the exercise by the Governor of a statutory power; and that, if the right to take possession were disputed, an express statutory remedy is provided, and is the sole remedy:

(*d.*) That no dispute had arisen upon the footing upon which accounts were to be kept after taking possession:

(*e.*) That no dispute had arisen touching the question of restoration of possession under section 123 of the said Act.

30. That thereafter, to wit, on the 26th day of September, the respondent, by the Crown Solicitor aforesaid, notified to the claimant Company the appointment of an arbitrator on behalf of the respondent under protest, in pursuance of the hereinbefore-mentioned letter of the 21st September, 1895, and subject to the contentions therein contained.

31. The respondent submits that, by virtue of the reasons disclosed in paragraph 29 hereof, the claimant Company cannot maintain any claim in respect of the notice in the said paragraph referred to, and that the said arbitrators have no jurisdiction to make any award in respect of the matters contained therein.

(Filed 23rd November, 1895.)

(A.)

[Map showing New Zealand Midland Railway.]

NOTICE OF MOTION FOR MORE EXPLICIT PARTICULARS.

COLONY OF NEW ZEALAND.

In the Matter of an Arbitration between the NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED), Claimant, and HER MAJESTY THE QUEEN, Respondent.

TAKE notice that Counsel for the respondent will move on Monday, the 25th November, 1895, at 10 o'clock in the forenoon, or as soon thereafter as Counsel can be heard,—

1. That such portions of the particulars of claim filed herein by the claimant Company as disclose no claim valid in law be struck out, and in particular the paragraphs Nos. 6, 7, 8, and 9 of the said particulars of claim.

2. That the claimant Company be ordered to give fuller and more explicit particulars as to the remaining paragraphs of its said particulars of claim.

Upon the grounds set out in the two several affidavits of Hugh Gully to be filed herein.

Dated at Wellington, the 23rd day of November, 1895.

HUGH GULLY,
Crown Solicitor, on behalf of Respondent.

AFFIDAVIT OF HUGH GULLY, ESQ., IN SUPPORT OF NOTICE OF MOTION *RE* JURISDICTION.

COLONY OF NEW ZEALAND.

In the Matter of an Arbitration between THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED), Claimant, and HER MAJESTY THE QUEEN, Respondent.

I, HUGH GULLY, of the City of Wellington and Colony of New Zealand, Solicitor, make oath and say:—

1. That I am Crown Solicitor for the Wellington District, and am acting as solicitor for the respondent in these proceedings.

2. That the notice dated the 30th day of November, 1894, a copy whereof is hereunto annexed marked "A" was served upon the respondent's representative in the colony on the 14th day of January, 1895.

3. That the time for performance of the contract referred to in the said notice expired on the 17th day of January, 1895, and at that time the claimant had constructed only about one-third of the total mileage it had contracted to construct. The cost of the work so constructed, on the basis of the estimate for land-grant purposes contained in the contract, is less than one-fifth of the total estimated cost of the works which the claimant contracted to construct, computed on the said basis.

4. That the respondent was thereupon advised that, owing to the non-performance by the claimant of its contract obligations, there had been such a breach of the contract as disentitled the claimant to go to arbitration thereunder.

5. That accordingly the claimant was notified of the position by letter dated the 27th day of March, 1895, a copy whereof is hereunto annexed marked "B."

6. That the appointment of an arbitrator on behalf of the respondent was made under protest, and subject to the objection in the last paragraph hereof mentioned, as appears by letter dated the 28th day of March, 1895, a true copy whereof is hereunto annexed marked "C."

7. That on the 25th day of May, 1895, under and by virtue of the provisions of "The Railways Construction and Land Act, 1881," and of "The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884," and of "The Midland Railway Contract Act, 1887," the Governor of the colony caused possession to be taken of the line of railway, and the said line has since remained in the possession and under the control of the respondent.

8. That thereafter the claimant caused a further notice, a true copy whereof is hereunto annexed marked "D" to be served upon the Agent-General of the colony in London, and, upon this being notified by cablegram to the Government, I wrote to the claimant a letter, copy whereof is hereunto annexed marked "E."

9. That on the 6th day of September, 1895, the notice in the last paragraph hereof mentioned was served upon the respondent's representative in the colony, accompanied by a letter, a copy whereof is annexed hereto and marked "F."

10. That I thereupon wrote to the General Manager of the claimant Company in the colony, and to the claimant's secretary in London, letters, of which copies are annexed hereto marked "G" and "H" respectively.

11. That the respondent has always been and is ready and willing to test the question as to whether there has been unreasonable or inexcusable delay by the claimant in the prosecution of its works, or whether the claimant has committed or suffered a wilful breach of its contract, in the manner provided by "The Railways Construction and Land Act, 1881," but the claimant has failed to take any steps thereunder.

12. That, by virtue of the matters hereinbefore mentioned, the respondent submits that the claimant has no power or authority to invoke the arbitration clause of the said contract, and that the arbitrators have no jurisdiction to hear any claim thereunder.

HUGH GULLY.

Sworn at Wellington, this 23rd day of November, 1895,
before me—

T. F. MARTIN,
A Solicitor of the Supreme Court of New Zealand.

(A.)

[This is the copy-notice marked "A," referred to in the annexed affidavit of Hugh Gully, sworn this 23rd day of November, 1895, before me—T. F. MARTIN, a Solicitor of the Supreme Court of New Zealand.]

[See "Notice of Appointment of Arbitrator" (First Reference), *ante*, p. 1.]

(B.)

[This is the copy-letter marked "B" referred to in the annexed affidavit of Hugh Gully, sworn this 23rd day of November, 1895, before me—T. F. MARTIN, a Solicitor of the Supreme Court of New Zealand.]

MEMORANDUM for R. WILSON, Esq., General Manager, New Zealand Midland Railway Company (Limited).

SIR,— Crown Solicitor's Office, Wellington, 27th March, 1895.

I beg to give you notice, on behalf of Her Majesty the Queen, that as the time for performance of the contract, dated the 3rd day of August, 1888, made between Her said Majesty of the one part and the above Company of the other part, expired on the 17th day of January, 1895, and that as the Company has failed or refused to perform its obligations thereunder, the said Company has broken, abandoned, and rescinded the said contract, and is not entitled to claim any right, benefit, or privilege thereunder.

The proceedings in pursuance of the Company's notice to arbitrate must therefore be taken to be subject to and without prejudice to the above. I have, &c.,

HUGH GULLY,
Crown Solicitor.

(C.)

[This is the copy-letter marked "C" referred to in the annexed affidavit of Hugh Gully, sworn this 23rd day of November, 1895, before me—T. F. MARTIN, a Solicitor of the Supreme Court of New Zealand.]

Crown Solicitor's Office, Wellington, 28th March, 1895.

SIR,— *Midland Railway Arbitration.*

I have the honour to inform you that the Crown has appointed Sir Charles Lilley (recently Chief Justice of Queensland) to be arbitrator in the proceedings instituted by you.

I presume your solicitor will prepare and forward a draft deed of reference, and that your claims against the colony will be specifically formulated therein, or in particulars appended thereto.

Up to the present time I am only apprised of the general nature of the claims, and that mainly by reference to the Parliamentary proceedings. It must be obvious that the subject-matter of inquiry before a Parliamentary Committee is, or may be, entirely different from the material properly to be introduced before a Court of Arbitration. I presume, therefore, you will indicate whether any of the claims pressed before the Committee will be eliminated upon the present proceedings. You will agree that it is undesirable that expense should be incurred in collecting evidence, either in support of or defence to causes of action which the arbitrators have no power to try.

After obtaining a specific statement of your claims, I should require a reasonable time to prepare the defence, although, of course, this time will be materially lessened by the knowledge derived from the Parliamentary proceedings. You may rely upon matters being pushed on with all promptitude consistent with the defence being properly placed before the arbitrators.

With reference to arranging the procedure so as to involve a minimum of delay and inconvenience, would it not be advisable to have a personal conference between your solicitors and myself?

As indicated in my letter of yesterday's date, all proceedings in reference to the arbitration must be taken to be without prejudice to the contention that the Company are barred by their own breaches and non-performance of its provisions.

I have, &c.,

R. Wilson, Esq., General Manager, HUGH GULLY, Crown Solicitor.
New Zealand Midland Railway Company (Limited)).

(D.)

[This is the copy-notice referred to marked "D," in the annexed affidavit of Hugh Gully, sworn this 23rd day of November, 1895, before me—T. F. MARTIN, a Solicitor of the Supreme Court of New Zealand.]

[See "Notice of Appointment of Arbitrator" (Second Reference), *ante*, p. 2.]

(E.)

[This is the copy-letter marked "E," referred to in the annexed affidavit of Hugh Gully, sworn this 23rd day of November, 1895, before me—T. F. MARTIN, a Solicitor of the Supreme Court of New Zealand.]

Crown Solicitor's Office, Wellington, 31st July, 1895.

SIR,— *Midland Railway.*

The Government have received information which apparently indicates that an attempt to institute further arbitration proceedings is being made by the company: The claims are said to be founded upon the taking possession of the lines of railway on the 25th May. I am instructed that notice of the appointment of Sir Bruce Burnside has been served upon the Agent-General in London. If this is so, I think it advisable to remind you that this process (though perhaps it has been served with some ulterior object) can hardly, even by your directors, be deemed to have any effect.

You are doubtless well aware that, under the contract (even if it were in existence, which it is not), notices must be served upon the Governor, or upon his appointee in the colony. The only person appointed by him is the Minister for Public Works, upon whom your former notice was served. Furthermore, I think it may be as well to again remind you that the Government recognise no right on your part to make any claims upon an unperformed contract after the time for performance has expired.

Furthermore, I have to point out to you that, if your directors seriously suggest that the delay in the performance of the contract is not unreasonable, or is excused by any act of the Colonial Government, they have a remedy expressly given under the Act which authorises possession to be taken. This procedure having been expressly provided, I beg to inform you that, according to the view of the advisers to the Government, no other tribunal is open to you.

I think I am justified in asking you to state definitely whether you are instructed not to proceed in the method indicated by the statute law of the colony.

I have, &c.,

HUGH GULLY,
Crown Solicitor.

R. Wilson, Esq., General Manager,
New Zealand Midland Railway Company, Christchurch.

(F.)

[This is the copy-letter marked "F," referred to in the annexed affidavit of Hugh Gully, sworn this 23rd day of November, 1895, before me—T. F. MARTIN, a Solicitor of the Supreme Court of New Zealand.]

MY LORD,— London, 13th July, 1895.

I am instructed by the directors of the New Zealand Midland Railway Company to inform you that the Company views the action of the Governor of New Zealand in seizing the railway as entirely unwarranted, and is without information as to the grounds upon which the course taken by the Governor has been adopted. Assuming, however, that the Governor is purporting to act under section 123 of "The Railways Construction and Land Act, 1881," the Company emphatically denies that there has been any unreasonable or inexcusable delay in the prosecution of the works connected with the railway, or that anything has happened to bring into operation the powers given by that section.

Further, that the Company is advised that even if any such event had happened, the Company was entitled, in accordance with the universal rule as to the exercise of such powers, to reasonable notice of the Governor's intention; that the Company desires to point out that under the 123rd section the Governor is not made the judge as to what is unreasonable or inexcusable delay, which is a question which should be determined under the arbitration clause, and that in taking the matter into his own hands, and prejudging the question in his own favour, he has acted entirely contrary to the contract. That the Company now desires to have the question of the legality of the Governor's action determined, and has accordingly served the accompanying notice. The Company further considers that the convenient course would be to refer this difference to the arbitrators who are now sitting, to be dealt with as a matter comprised in the existing reference.

I am further instructed to ask, without prejudice, as to the further intentions of the Governor, that is to say: whether, having taken possession of the railway, he proposes to complete the same and conduct the traffic thereon, or to exercise the alternative power—*i.e.*, to restore possession to the Company. I am also to point out that whichever course is taken the damage to the Company and its credit will be very large.

At this moment my directors abstain from any discussion as to the rights of the debenture-holders, although taking a strong view that, even if as against the Company the action of the Governor has been authorised, it could not be maintained as against the debenture-holders, but that the Company thinks that is a matter for the debenture-holders to raise independently, they not being parties to the contract. I am, &c.,

The Right Hon. the Earl of Glasgow. ÆNEAS R. MCDONNELL, Secretary.

(G.)

[This is the copy-letter marked "G," referred to in the annexed affidavit of Hugh Gully, sworn this 23rd day of November, 1895, before me—T. F. MARTIN, a Solicitor of the Supreme Court of New Zealand.]

Crown Solicitor's Office, Wellington, 21st September, 1895.

SIR,— Re *Midland Railway Company (Limited).*

By direction of the Hon. the Premier, I beg to acknowledge the receipt by His Excellency the Governor of the notice, dated the 13th July, 1895, of the appointment of Sir Bruce Burnside, Q.C., as arbitrator for the purposes therein mentioned.

To the matters contained in that notice I am instructed by the Premier to reply as follows:—

I. I deny that your notice discloses any valid ground for invoking the arbitration clause in the Midland Railway contract, for the reasons already indicated to you, namely:—

(1.) That the Company has entirely failed in its obligation to the colony in carrying-out even a substantial portion of its contract work within the contract time:

(2.) That the taking possession by the Governor under the statutory authority of "The Railways Construction and Land Act, 1881," excludes any right to proceed to arbitration under the contract.

II. I further have to notify that, apart from the above grounds, the Company's notice, in the opinion of the advisers to the Government, discloses no right on the part of the Company to proceed to arbitration, for the following reasons:—

(1.) That no dispute has arisen touching the meaning and effect of the contract or otherwise coming within the scope of clause 47:

(2.) That the legality of taking possession depends upon the exercise by the Governor of a statutory power; and further, that in case the right to take possession is disputed, there is an express statutory remedy which the Company is attempting to evade:

(3.) That no dispute has arisen upon the footing upon which accounts are to be kept after taking possession:

(4.) That no dispute has arisen touching the question of restoration of possession under section 123 of the said Act.

Upon the grounds above indicated I have to protest against the attempt by the Company to force on arbitration proceedings upon the subject-matter of your notice. As, however, the Company threatens to proceed with the reference to arbitration *ex parte* (following the course adopted upon your previous notice of appointment), I have to state that the Governor has appointed Sir Charles Lilley, Knight, to act as arbitrator herein.

This appointment is, of course, made without prejudice to the objections above formulated, and the Government will, at the proper stage, object to the validity of the Company's action.

I think it right to add that to acquiesce in arbitration proceedings in the face of the above objections would be to waive the right of the colony to complain of the complete and notorious breach by the Company of its obligations. This contract is a statutory one; the Government are answerable to the colony for its due fulfilment, and in their opinion nothing short of legislation would justify them in assenting to its terms being almost entirely abrogated.

I have, &c.,
HUGH GULLY,
Crown Solicitor.

R. Wilson, Esq., Engineer-in-Chief and General Manager,
Midland Railway Company, Christchurch.

(H.)

[This is the copy-letter marked "H," referred to in the annexed affidavit of Hugh Gully, sworn this 23rd day of November, 1895, before me—T. F. MARTIN, a Solicitor of the Supreme Court of New Zealand.]

Crown Solicitor's Office, Wellington, 21st September, 1895.

SIR,— Re *Midland Railway Company (Limited).*

I am instructed by the Hon. the Premier to reply to your letter dated 13th July, 1895, to the Governor of the colony.

I have already written to the General Manager of the Company in the colony in reference to the notice of appointment of arbitrator, bearing even date with your letter, and enclose herewith a copy of my letter to him.

Your letter to His Excellency the Governor mainly contains controversial matter, which at the present stage it would appear might well have been avoided. In order, however, to prevent the suggestion that there is any acquiescence on the part of the Government in the position asserted by you, I beg to make the following observations:—

1. "The Company emphatically denies that there has been any unreasonable or inexcusable delay in the prosecution of its work."

As to this, it is perfectly futile at this stage to enter into a controversy as to whether or not the performance of a fractional part of the work (perhaps one-fifth, or less) within the full period of ten years can be considered as an adequate performance of the contract. The intention to perform the contract in full has been, as you are aware, for years virtually abandoned.

If your Company really contends that the delay is excused or made reasonable by the conduct of the Government, why do they evade the tribunal appointed by statute for the express purpose of dealing with such objections?—the statute itself being the one to which the contract owes its very existence.

In point of fact, I have no doubt that your directors are fully aware of the fact that the delay has been caused either by concessions sought by the Company in modification of its own contract or by want of funds.

2. You state that "The Company was entitled to reasonable notice of taking possession." Surely your directors were aware of the power to take possession, and were further aware that notice of breach and intention to treat the contract as abandoned was served on the General Manager on the 27th day of March, 1895, two months before possession was taken. May I ask what you suggest the Company would have been prepared to do if further formal notice *had* been given.

3. You state "That the Governor is not made the judge as to what is unreasonable or inexcusable delay." That is precisely what I have more than once insisted upon. No one but yourself ever suggested that the Governor was made the judge, or that he was guilty of "prejudging the question in his own favour." The judge of the question, as you are well aware, is a Judge of the Supreme Court of the colony, the tribunal which your directors are evidently not prepared to face, although it would surely be in every sense more convenient and proper to have the question as to whether there has been unreasonable or inexcusable delay disposed of before proceeding with the arbitration generally upon the merits of any of the other disputes arising under the contract. In this case His Excellency the Governor has no more presumed to judge the case than any mortgagee, lessor, or contractee adjudicates upon the position when he exercises an express power of entry upon breach. In any such case there is a remedy if the entry is unlawful. That remedy has been repeatedly pointed out to you without result.

4. You ask "whether the Governor proposes to complete the railway and conduct the traffic thereon, or to exercise the alternative power—that is, to restore possession to the Company?"

I am at a loss to understand what can be the object of your asking this question at the present stage. If, however, you are serious in making the inquiry, may I ask, in the terms of section 123 of the Act, "what are the terms and conditions which the Company proposes to offer in order to justify the Governor in making this concession?"

For years past the colony has been disposed to grant the Company concessions of a most substantial kind, both as to time and otherwise, provided that the Company could satisfy the Government of its ability to carry out the work; but this the Company has never done.

5. The matter of debentures, also, it is unnecessary to discuss at any length. It appears difficult to concur with your very confident assertion of the position. The debenture-holders are secured by a charge upon the Company's contract. That contract is subject to a statutory right in the Governor of the colony to enter for breach. There has been breach: the Governor has entered. Yet your directors take "a strong view" that the debenture-holders can abrogate the Crown's remedy for breach of the contract over which they hold a security.

If there has been no breach on the part of the Company, then there is no difference, as you assert, between the position of the Company and the position of the debenture-holders. If there has been breach, then I am unable to concur with your view that the debenture-holders are in any better position than the Company.

I am, &c.,
HUGH GULLY,
Crown Solicitor.

Æneas R. McDonnell, Esq.,
Secretary, Midland Railway Company of New Zealand (Limited),
61 and 62, Gracechurch Street, London, E.C.

FURTHER AFFIDAVIT OF HUGH GULLY, ESQ., IN SUPPORT OF NOTICE OF MOTION *RE* PARTICULARS.

COLONY OF NEW ZEALAND.

In the Matter of an Arbitration between THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED), Claimant, and HER MAJESTY THE QUEEN, Respondent.

I, HUGH GULLY, of the City of Wellington, and Colony of New Zealand, Solicitor, make oath and say:—

1. That I am Crown Solicitor for the District of Wellington, and am acting as Solicitor for the respondent in these proceedings.

2. That notice of its desire to refer all disputes, differences, and questions herein to arbitration was served by the claimant upon the respondent's representative in the colony on the 14th day of January, 1895.

3. That thereafter application was made on behalf of the respondent, requesting the claimant to furnish the respondent with particulars of the matter and questions alleged to be in dispute, and of the claimant's claim against the respondent.

4. That the only particulars so furnished by the claimant up to the 22nd day of November, 1895, are contained in the memorandum of which the following is a true copy:—

"The claim of the Company will be in respect of the breaches of contract and grievances,—
"(1.) Under subclause (*c*) of clause 16.
"(2.) Under clause 18.
"(3.) Under clause 33.
"(4.) Under clause 42.
"(5.) In respect of the misrepresentation of the Minister and of his officials before the Committee of 1893 (*sic*) having made it impossible for the Company to raise the necessary capital to complete the railway.
"(6.) In respect of the oppressive taxation imposed since the contract was entered into."

The said memorandum was served upon me in the month of April, 1895.

5. The nature of the aforesaid application for particulars, and the reasons upon which such application was grounded, appear by the correspondence, copies whereof are hereunto annexed marked "A."

6. That, as appears from the said correspondence, the claimant has failed to supply any reasonable particulars, either of its claim or of the alleged grievances upon which such claim is founded.

7. By reason of the failure of the claimant to give notice of its claim with reasonable particularity the respondent has been greatly embarrassed in preparing the case for hearing.

8. It is not true, as stated in Mr. Wilson's letter hereunto attached, dated the 29th day of October, 1895, that any difficulties have been raised by the Government in the way of giving access to sources of information which is or may be required by the claimant Company in the preparation of its case. On the contrary, I am informed and believe that every reasonable application for information made by or on behalf of the Company has been complied with. No application whatsoever has been made to me for information, or for production or inspection of documents or papers or otherwise.

HUGH GULLY.

Sworn at Wellington, this 23rd day of November, 1895,
before me—
T. F. MARTIN,
A Solicitor of the Supreme Court of New Zealand.

(A.)

[This and the following *three* pages comprises the copies of correspondence marked "A," referred to in the annexed affidavit of Hugh Gully, sworn before me, this 23rd day of November, 1895.—T. F. MARTIN, a Solicitor of the Supreme Court of New Zealand.]

Crown Solicitor's Office, Wellington, 28th March, 1895.

SIR,— *Midland Railway Arbitration.*

I have the honour to inform you that the Crown has appointed Sir Charles Lilley (recently Chief Justice of Queensland) to be arbitrator in the proceedings instituted by you.

I presume your solicitor will prepare and forward a draft deed of reference, and that your claims against the colony will be specifically formulated therein, or in particulars appended thereto.

Up to the present time I am only apprised of the general nature of the claims, and that mainly by reference to the parliamentary proceedings. It must be obvious that the subject-matter of

inquiry before a Parliamentary Committee is or may be entirely different from the material properly to be introduced before a Court of Arbitration. I presume, therefore, you will indicate whether any of the claims pressed before the Committee will be eliminated upon the present proceedings. You will agree that it is undesirable that expense should be incurred in collecting evidence either in support of or defence to causes of action which the arbitrators have no power to try.

After obtaining a specific statement of your claims, I should require a reasonable time to prepare the defence, although of course this time will be materially lessened by the knowledge derived from the parliamentary proceedings. You may rely upon matters being pushed on with all promptitude consistent with the defence being properly placed before the arbitrators.

With reference to arranging the procedure so as to involve a minimum of delay and inconvenience, would it not be advisable to have a personal conference between your solicitors and myself?

As indicated in my letter of yesterday's date, all proceedings in reference to the arbitration must be taken to be without prejudice to the contention that the Company are barred by their own breaches and non-performance of its provisions.

I have, &c.,
HUGH GULLY,
Crown Solicitor.

R. Wilson, Esq., General Manager,
New Zealand Midland Railway Company (Limited.)

Crown Solicitor's Office, Wellington, 11th April, 1895.

SIR,— *Midland Railway Company.*

It seems very evident that proceedings upon the reference to arbitration will be hung up for a long and indefinite period. The result will be, if this is permitted, that a large area of the public estate will continue to be locked up. The damages chargeable against the Company, if it turns out to be liable, will go on increasing, and in any event the colony must suffer by the delay. For this reason, and also because the Government are advised that the Company has substantially failed to perform its obligation to the colony under the contract, I am instructed to notify you that an action will be commenced at once against the Company, claiming damages for breach of contract. The statement of claim is being prepared, and the writ will be issued and served immediately after the Easter vacation. May I ask you whether you will instruct your Wellington solicitor. Further, I have to request that I may be supplied with particulars of your counterclaim against the Crown. It is manifestly absurd to suggest that the matter of complaint urged before a Parliamentary Committee can form any guide to the formulation of a legal cause of action. The formulated claim handed to me by your solicitor in answer to my request in the arbitration proceedings can hardly be taken seriously, as you will see from the copy which I append. I suggest that, without waiting for the expiration of the time for pleading, you should furnish specific particulars for the reasons above stated, and also because it will be necessary that steps should be taken at once, and, in point of fact, to collect evidence upon the possible points involved. I am without information as to any specific charges intended to be relied on by your Company. For instance, I do not know what reserves under clause 16 you intend to attack, although I can hardly suppose it possible that you will propose to attack all. Neither do I know whether you seriously intend to urge all matters which were put as grievances before the Public Accounts Committee. It is surely perfectly plain that some, at least, cannot in law be supported. Why not indicate the actual points upon which you now rely, so as to minimise the inconvenience and expense of preparing for trial. I trust this will commend itself to you as being reasonable. If you can see your way to give further particulars without our waiting for the formal defence, I should be obliged if you would let me have them at once. Meantime, I think you must take the responsibility of imposing on the Government the necessity of going to great expense in getting evidence, of which a part, at least, will turn out to be useless.

I have, &c.,
HUGH GULLY,
Crown Solicitor.

R. Wilson, Esq., General Manager,
New Zealand Midland Railway Company, Wellington.

Wellington, 13th April, 1895.

SIR,— Re *Midland Railway.*

I cannot but express my astonishment at your letter of the 11th instant. It displays such a disregard for the interests of all concerned that I cannot too strongly protest against the course proposed to be taken.

If the proceedings you threaten are designed to force a disclosure of the Company's case on the matters in dispute between the Crown and the Company, I cannot recognise the right of the Crown to endeavour to anticipate the proceedings of the Arbitration Court.

That more precise particulars of the Company's claim will be necessary I readily admit. The Company has had prepared ready to file such particulars as the Arbitration Court would probably consider should be furnished to the Crown, and that these are not already in your hands is a matter of regret to the Company; but the delay in the arbitration proceedings has not been due to any action on the part of the Company. It awaits the direction of the Arbitration Court as to the procedure to be followed, and I am advised that the Supreme Court will probably not seek to anticipate the jurisdiction of that tribunal.

At the same time I beg to assure you that (apart from any proceedings such as you threaten) I am prepared to give you any such information with regard to the claims of the Company under the headings (1), (2), (3), and (4) of the summary you acknowledge to have received, in sufficient time to enable you to collect all the evidence available before the date when the Arbitration Court is expected to sit.

The claim of the Company for an extension of time for the completion of the railway is one of which the Crown has had repeated notice, and, arising as it does from the intention of the parties as frequently expressed, and from the grounds indicated in the summary you have, can admit of no uncertainty.

If the Crown is still determined on the proceedings you indicate, I have, in response to your request that the Company instruct a solicitor, to refer you to Mr. G. Hutchison, who will act for the Company.

I have, &c.,
ROBERT WILSON,
Engineer-in-Chief and General Manager,
New Zealand Midland Railway Company.

H. Gully, Esq., Crown Solicitor, Wellington.

Crown Solicitor's Office, Wellington, 20th April, 1895.

SIR,— *Midland Railway.*

I have the honour to acknowledge receipt of your letter of the 13th instant, received by me on the 17th.

I think it unnecessary to comment on the tone of your letter. It seems somewhat peculiar that the assertion of the public right, as against a Company which has failed to perform four-fifths of its contract, should be described as a threat, or said to display a disregard for the interests of all concerned. However, in reply, I have to inform you that the whole question is now under consideration, and that the Government will shortly decide what steps ought to be taken in the interests of the colony. Meantime the writ will not be served.

I have, &c.,
HUGH GULLY,
Crown Solicitor.

R. Wilson, Esq., General Manager,
Midland Railway Company, Wellington.

Crown Solicitor's Office, Wellington, 8th October, 1895.

SIR,— Re *Midland Railway Company.*

Permit me to draw your attention to my letter of the 28th March, 1895.

I have again to request that you will supply me with particulars of the claims against the colony which you propose to bring before the arbitrators. With the general nature of your complaints to a Parliamentary Committee we are acquainted; but you will hardly deny that such knowledge is not a fair or reasonable guide to the case which we shall be called upon to meet. It is an unheard of and grossly unfair position to attempt to force a defendant to appear in Court, and that he should then, for the first time, learn the specific charges relied upon by the claimant. Counsel for the Crown cannot possibly be in a position to cross-examine witnesses unless some reasonable particulars of the claimant's case are supplied. The result must be that your conduct, in this respect, will make a postponement of the hearing at the outset inevitable; and for this you must take the responsibility. It does appear extraordinary, in a case of this magnitude, that the Crown should have to submit to persistent refusal or neglect to supply reasonable particulars of the Company's claims. The details formulated by the memorandum, undated and unsigned, handed to me in April, would be rejected as insufficient in a Magistrate's Court upon a claim for £5. I have not been informed, even in the vaguest way, of the amount claimed for compensation. You are, of course, laying the Company open to the suggestion that the specific nature of its grievances is being purposely withheld. I have now in vain attempted, for a period of six months, to obtain particulars which, in an action, you could have been compelled to grant in a week.

I have, &c.,
HUGH GULLY,
Crown Solicitor.

The Engineer-in-Chief and General Manager,
New Zealand Midland Railway Company.

Crown Solicitor's Office, Wellington, 25th October, 1895.

SIR,— Re *Midland Railway Arbitration.*

I must again repeat my request that you will endeavour to furnish me with a statement setting forth your claim with reasonable particularity.

I cannot but state that not only is your continued failure to supply them likely to delay and interfere with the course of proceedings, but I think I must say that it is not respectful to the tribunal before which these proceedings are to be taken.

That a claim of this magnitude should have been left up to the present stage without any deed of reference, or any particulars worthy of the name, is almost incredible.

I have, &c.,
HUGH GULLY,
Crown Solicitor.

The Engineer-in-Chief and General Manager,
Midland Railway Company (Limited), Christchurch.

New Zealand Midland Railway Company (Limited),
156, Worcester Street, Christchurch, N.Z., 29th October, 1895.

SIR,— *Midland Railway Company.*

I have the honour to acknowledge the receipt of your letter of the 8th instant, and in reply I beg to remind you that your letter of 28th March was dealt with at the time. As soon as the

Arbitration Court is constituted and settles the procedure, the Company will be prepared to conform to any direction that may be given as to filing or serving particulars.

The analogy you appear to set up in the last paragraph of your letter now under answer does not apply. The Company will be prepared to deliver "particulars" in much less than "a week" so soon as the Arbitration Court is in a position to treat the proceedings as in the nature of "an action."

As to the memorandum you refer to as handed to you "undated and unsigned" in April last, it was enough, surely, that it was delivered to you by the representatives of the Company.

As to your somewhat excited remarks touching the absence of knowledge on your part as to the Company's case, I might refer to the difficulties which have unnecessarily been raised by the Government in the way of obtaining access to sources of information, which being of a public character might have been expected to have been treated as other than private, but I refrain. I may mention, however, that in addition to the claims indicated in the memorandum of April, there will, as you may surmise, now be a further claim in respect of the taking possession by the Crown of the railway in May last.

I have, &c.,
For the New Zealand Midland Railway Company (Limited),
ROBERT WILSON,
Engineer-in-Chief and General Manager.

Hugh Gully, Esq.,
Crown Solicitor, Wellington.

P.S.—I am just in receipt of your letter of the 25th instant, to which this is a sufficient reply.

NOTICE SETTING FORTH PRINCIPLE ON WHICH DAMAGES CLAIMED BY COMPANY IN RESPECT OF MINING RESERVES.

IN ARBITRATION.—THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED) AND HER MAJESTY THE QUEEN.

WHERE two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it.

If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated.

It is a rule of interpretation that the intention of the parties is to be ascertained from the whole contract considered in connection with the circumstances known to them both. If it appear by such circumstances that the contract was entered into, and known by both parties to be entered into, for a particular purpose, whether to secure special gain or to avoid anticipated loss, the liability of each will be determined and the amount of damages ascertained with reference to the effect of the breach in hindering or defeating that object.

The contemplation of damages will include such as arise according to the intrinsic nature of the contract and the surrounding facts and circumstances, made known to the parties at the time of making it.

Application of these Principles to the Company's Case.

The inducement and main consideration moving from the Queen to the Company, and in consequence of which the Company agreed to enter upon the construction of the railway, was the prospective granting of land on the basis of the B 1 value to the extent of 50 per cent. of the statutory cost (for land-grant purposes) of the railway, and the prospective improved values of such lands.

It was contemplated by both parties that the Company should rely for its financial power upon the advantages and security which the land-grant would give it.

It was therefore within the contemplation of the parties that any material injury to or depreciation in value of the lands within the authorised area would hinder or destroy the financial power of the Company.

It was known to both parties that certain of the lands were of special value, because, *inter alia*, of their vicinity to the line, of their vicinity to the settled districts, or of the large quantities of valuable timber and coal upon such lands, and that the Company relied upon its right to select these lands as a material part of the inducement to and consideration of the contract.

It was the contract between the parties that that right of selection should be subject only to the right of the Crown to reserve lands which were, or should be, from time to time required for *bonâ fide* mining purposes. It was the duty of the Crown to exercise that right in a reasonable manner and in good faith.

The reservation of lands proclaimed was not the due exercise by the Crown in good faith of the right of reservation provided by the contract, and therefore was a breach of contract by the Crown.

The notice of proposed reservation of other blocks not yet proclaimed was an intimation by the Crown of its intention not to adhere to its contract, and the Company was entitled to treat it as a breach of contract by the Crown.

The result of such breaches of contract, and of each of them, was the injury to and practical destruction of the financial powers of the Company, and was a wrongful depreciation by the Crown of the value of the land-grant, and a wrongful restriction by the Crown of the area from which the Company were entitled to select their grant.

The damages which naturally flowed from such breaches of contract, and from each of them, were the loss of the moneys expended by the Company, and of the profits which would have reasonably resulted to the Company from the contract.

These damages, which the Company assesses at the sum of £1,584,900, the Company therefore claims to recover from the Crown.

FURTHER PARTICULARS OF CLAIM DELIVERED BY THE COMPANY.

IN ARBITRATION.—THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED) AND HER MAJESTY THE QUEEN.

THE New Zealand Midland Railway Company (Limited) refers to arbitration, as provided by clause 47 of the contract dated the third day of August, 1888, and made between the parties, all matters arising subsequent to the 14th day of January, 1895. The acts and defaults complained of are those of the Executive of the Colony of New Zealand, acting for the Queen, by and through the Governor of the colony, or by and through the Minister for Public Works.

The Company claim as follows:—

1. That the undertaking of the Company being work to be remunerated in part by land, as provided by clause 16 of the contract, the Queen, contrary to the provisions of the said contract, refused and prevented the exercise by the Company of its rights of selection over large areas of land within the authorised area.

2. That the Queen has, in contravention of the contract, permitted and authorised the destruction and the removal of timber on lands available for selection, and thereby depreciated the value of such lands.

3. That the Company being entitled to select under the provisions of the contract land to the amount of £19,304, and having given notice in that behalf, the Queen, by the Minister for Public Works, on or about the 20th day of April, 1895, refused to allow the Company to exercise its rights.

4. That the Company, being entitled to select lands, the Queen, under agreement with the Company, having sold certain such lands, being those described in the B 1 map as "Nelson Towns: Reefton" (196 sections in number), and having received the proceeds thereof (the particulars of which have been refused to the company) has in contravention of the contract refused to pay over the same to the Company.

5. That the Company being entitled to have the titles to other lands already selected issued under the provisions of the said contract, the Queen has, in contravention of the contract, refused to complete and issue such titles.

6. That the Queen having agreed to refer to arbitration a question as to the boundaries of B1 Block 65 (which had been selected and dealt with by the Company), has refused to proceed to such arbitration, whereby the Company has been prevented from completing the sale of the said B1 Block, and has suffered great loss and damage.

7. That the Queen on the 25th day of May, 1895, in contravention of the contract and without any due or proper cause, took possession and assumed the management of the railway then in the possession of the Company, and wrongfully converted the same to her own use.

That, by and in relation to the foregoing matters, the Company has lost the entire benefit of the contract and all the expenditure thereunder. Wherefore the Company claims to recover from the Queen the sum of £1,817,900, together with interest at 5 per cent. per annum upon £845,000 debenture capital, from the 14th day of January, 1895, till the date of award.

(Delivered 28th November, 1895.)

MINING RESERVES OBJECTED TO BY THE COMPANY.

IN ARBITRATION.—THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED) AND HER MAJESTY THE QUEEN.

Statement of Approximate Areas of Land which the Company asserts should not have been included in the Mining Reserves.

THIS statement is filed without prejudice to the Company's general objection that areas of land included in the mining reserves, but not particularly objected to by the Company, include small quantities of land scattered throughout the reserves, which, on survey, would be found to be unjustifiably reserved.

And also without prejudice to the Company's objection that the reserves in general were not made in accordance with the contract.

No.	Reserved.	Justifiable.	Unjustifiable.	No.	Reserved.	Justifiable.	Unjustifiable.
			NELSON DISTRICT.				
1	5,000	Nil.	5,000	69	9,000	3,620	5,380
2	10,000	4,000	6,000	70	6,500	3,200	3,300
3	10,000	5,500	4,500	71	9,000	2,500	6,500
4	8,500	1,300	7,200	74	8,800	5,500	3,300
5	9,600	6,600	3,000	75	8,600	4,060	4,540
6	5,600	700	4,900	77	7,500	1,770	5,730
25	8,320	630	7,690	79	10,000	5,250	4,750
26	8,320	630	7,690	80	10,000	4,800	5,200
27	6,250	Nil.	6,250	81	4,500	1,100	3,400
28	8,320	40	8,280	85	3,000	300	2,700
30	2,560	320	2,240	86	8,000	2,900	5,100
51	9,900	5,700	4,200	87	7,000	5,030	1,970
53	9,000	4,100	4,900	89	8,500	3,870	4,630
54	7,000	6,620	380	93	9,000	Nil.	9,000
59	10,000	7,150	2,850	94	7,500	1,150	6,350
61	10,000	3,000	7,000	95	7,500	1,875	5,625
62	10,000	3,110	6,890	97	10,000	2,800	7,200
63	10,000	5,360	4,640				
65	10,000	1,270	8,730		301,770	108,505	193,265
66	9,000	2,750	6,250				
			WESTLAND BLOCKS.				
1	5,250	800	4,450	8A	1,700	200	1,500
2A	5,170	2,840	2,330	9	3,000	1,900	1,100
2B	1,500	5	1,495	11	3,000	130	2,870
5	10,000	5,400	4,600	12	2,000	1,336	664
6	3,500	370	3,130				
7	10,000	9,000	1,000		45,120	21,981	23,139

COMPANY'S STATEMENT OF TIMBER DESTROYED WITHIN AREA OF SELECTION.

IN ARBITRATION.—BETWEEN THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED) AND HER MAJESTY THE QUEEN.

Statement of Areas of Land upon which Timber has been Cut or Destroyed, as mentioned in paragraphs 2 and 3 of the Particulars delivered by the Company on the 23rd November, 1895, and in paragraph 2 of the Particulars delivered by the Company on the 28th November, 1895.

WESTLAND FORESTS.

Timber Areas held under Warden's Court License.

Warden's Court of Issue.	Number or Date of Certificate.	Names of Licensees.	G.M. Reserve No.	Survey District.	Area, in Acres.	Remarks.
Kumara ...	19 24/10/94	Morris, William ...	6	Waimea	200	
"	18 14/7/94	Scott, James	6	"	200	
"	22 12/10/94	Morris, William ...	6	"	200	
"	13 6/10/93	Andrews, J.	2A	"	40	
"	5 21/10/92	Fairburn, S.	6	"	200	
"	21 14/11/94	Lawson, A.	5	Hohonu	200	
"	11 18/8/93	Morris, G.	6	Waimea	144	
"	25 26/9/94	Fairburn, S.	6	"	200	
"	$\frac{7}{98}$	Jorgenson	6	"	31	
"	$\frac{9}{98}$	Morris, W.	1	"	200	
		"	1	"	200	Reserved area.
"	$\frac{17}{98}$ 15/12/93	Gillies, J. D. (Wilson and Company)	6	"	145	
"	22	Morris, W.	6	"	200	Reserved area.
"	1 27/5/92	Grey Tramway Company	6	"	140	
"	2 22/7/92	McConnon, D. ...	1	"	100	
"	15 24/11/93	Watson	1	"	200	
"	3 5/8/92	McConnon, J. ...	1	"	200	
"	26 22/5/95	Gillies, J. D.	6	"	200	
		Watson, R.	1	"	200	Reserved.
Hokitika ...	$\frac{2}{1894}$	McMillan	3	"	200	
"	...	McMillan, H. ...	3	"	95	
Stafford ...	34 20/7/93	Lyons, B.	2	Waimea	200	Renewed 13/11/94
"	36 23/7/93	McWhirter, I... ...	2B	"	200	"
"	35 20/7/93	Henne, F.	2B	"	200	"
"	55 25/11/93	Byrne, James ...	2B	"	200	
"	57 21/11/94	Lyons, B.	2	"	200	Reserve.
"	46 18/9/95	Johnston, J.	2A	"	120	
"	61 5/12/94	Stevenson, A. ...	2A	"	200	
Greymouth	1 3/2/92	Stratford and Blair ...	7	Grey	200	
"	17/5/92	Violich, F.	8 and unproc	Hohonu	200	

Westland Forests.

Timber Areas occupied or cut without Warden's License but with Knowledge of the Queen.

G.M Reserve or Unproclaimed.	Locality.	Survey District.	Names of Cutters.	Remarks.
8A	Kaimata ...	Hohonu ...	Stratford and Blair	
Unproclaimed ...		" ...	Slowey and party	
" ...	Between Big Fuchsia and Cockeye Creek	" ...	Lawson and Sons	
" ...		" ...	Lawson Brothers	
" ...		" ...	Middleton	
" ...		" ...	Stewart Brothers	
" ...		Waimea ...	McKeegan	
" ...		" ...	Stewart	
" ...		" ...	Hunt and Sons	
" ...		" ...	Wylde Brothers	
" ...		" ...	Mehara Brothers	
" ...		" ...	White and party	
" ...	Between E.B. Road and Kapitea Creek and part Mining Reserve, Block 6	" ...	McCormack	
" ...		" ...	Fairburn	
" ...		" ...	Welby and Son	
" ...		" ...	R. Smith	
" ...		" ...	C. C. Murtha	
" ...		" ...	Sanders and party	
" ...		" ...	Hogan and party	
" ...		" ...	Upton and mate	
" ...		" ...	P. Kiely	
" ...		" ...	Griffin and McKeegan	
" ...		" ...	Brown and Goade	
" ...		" ...	Smith and party	
		" ...	O'Brien Brothers	
		" ...	McCormack and party	
Part Block 2B (Mining Reserve) and unproclaimed, near Kapitea Creek ...	...	" ...	D. Garrick	
		" ...	Mehara Brothers	
		" ...	R. Lee	
		" ...	McGeegan and party	
		" ...	R. Lee and mate	
		" ...	Johnston	
		" ...	Hanron	
Unproclaimed ...	Kapitea ...	" ...	Violich	
" ...	" ...	" ...	Fairburn	
2 (G.M. Reserve) ...	Pipe-Line Road	" ...	Martin and Morgan	200-acre lease.
Unproclaimed ...	Reservoir Res....	" ..	Goade and others	
" ...	Kawaka Creek	" ...	Bottom	
" ...		" ...	Gale	
" ...		" ...	McGeegan	
" ...	...	" ...	Thompson and others	
2 (G.M. Reserve) ...	Kanieri Lake	Kanieri ...	Head and Sons	
Unproclaimed ...		" ...	McMullan	
" ...		" ...	McFadgen	
" ...	Ross Road ...	Mahinapua	Stevens	

Nelson.—Westport Forests.

Timber Areas held under Warden's License.

Warden's Court of Issue.	Number or Date of Certificate.	Names of Licensees.	G.M. Reserve No.	Survey District.	Area in Acres.	Remarks.
Westport ...	$\frac{54}{95}$ 26/4/95	Gibson, G. ...	2	Steeples ...	84	
" ...	21/6/95	Gibson, W. ...	2	"	168	
" ...	$\frac{91}{95}$ 20/5/95	McKay, G. ...	2	"	52	
" ...	26/8/95	Creede, J. ...	2	"	200	
" ...	16/7/95	Fox, F. G. ...	2	"	200	
" ...	20/8/95	Carter, G. ...	2	"	200	
" ...	$\frac{88}{93}$ 25/5/94	Marris, J. ...	1	Kawatiri ...	200	Renewed 19/8/95
" ...	$\frac{148}{94}$ 23/6/94	Bull, W. ...	1	"	200	Renewed 14/2/95.

NELSON.—WESTPORT FORESTS.

Timber Areas occupied or cut without Warden's License, but with Knowledge of the Queen.

G.M. Reserve No.	Locality.	Survey District.	Names of Cutters.	Approximate Area.
				Acres.
Unproclaimed ...	Near Sergeant's Hill ...	Kawatiri ...	Marris, J.	100
" ...	Between German Creek and branch Orowaiti River	" ...	"	192
" ...	Between branch of Orowaiti and River Orowaiti	" ...	"	50
	North of G.M. Block 2 ...	Steeples ...	Slowey, Sutherland, Gibson, Tiller, Berry, Aherne, B. Harris and party, Fitzgerald, Gibson, and numerous others	1,372
1	Lying east of Deadman's Creek	Kawatiri ...	Bull, W.	225

NELSON.—GREY VALLEY FORESTS.

Timber Areas held under Warden's Court Licenses.

Warden's Court of Issue.	Number or Date of Certificate.	Names of Licensees.	G.M. Reserve No.	Survey District.	Area in Acres.
Ahaura	24/10/92	Hahn, G.	70	Ahaura ...	180
"	"	Algie and Priest ...	77	Mawheranui ...	50
"	27/2/93	Gosling and Saddler	Unp.	" ...	100
"	"	Feary, H. ...	81	" ...	200
"	28/8/93	Hahn, G.	74	" ...	200
"	25/9/93	Frodi, J.	71	Ahaura ...	200
"	"	Feary, T.	81	Mawheranui ...	200
"	6/11/93	Algie, C. F. C. ...	77	" ...	200
"	22/1/94	Harrison, C. ...	79	" ...	60
"	26/2/94	Lundgvest ...	81 and 80	" ...	200
"	23/4/94	Uddstrom ...	81	" ...	200
"	"	Ericson, G. ...	71	Ahaura ...	200
"	28/5/94	Gosling, F. ...	77 and unp.	Mawheranui ...	100
"	"	Saddler, W. A. ...	Unp.	Ahaura ...	100
"	25/6/94	McGee, P. ...	"	Mawheranui ...	200
"	24/9/94	Olafson, E. ...	81	" ...	200
"	22/10/94	Dunbar, J. ...	80 and unp.	" ...	200
"	"	Cooper, J. ...	"	" ...	200
"	"	Baxter, J. ...	"	" ...	200
"	"	Baxter, T. ...	"	" ...	200
"	"	Wright, J. ...	"	" ...	200
"	"	Baxter, W. ...	"	" ...	200
"	29/4/95	Matheson, A. ...	70	Ahaura ...	200

NELSON.—GREY VALLEY FORESTS.

Timber Areas occupied or cut without Warden's License, but with Knowledge of the Queen.

G.M. Reserve or Unproclaimed.	Locality.	Survey District.	Names of Cutters.
Unproclaimed	Moana	Brunner	Stratford and Blair.
65	Snowy	Mawheraiti .	Stratford and Blair.
Unproclaimed	Matai	Mawheranui ...	Stratford and Blair.
"	Brunner	...	Lake Brunner Sawmilling Company.
"	Mawheraiti ...	Mawheraiti ...	G. Perotti.

MEMORANDUM OF AGREEMENT AS TO SECOND REFERENCE.

COLONY OF NEW ZEALAND.

In Arbitration. — Between THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED), Claimant, and HER MAJESTY THE QUEEN, Respondent.

IT is hereby agreed between the claimant and the respondent—

1. That the matters referred to in the particulars delivered by the claimant in pursuance of notice of arbitration dated the 13th day of July, 1895, shall be deemed to be duly included in the matters referred to arbitration herein, and the parties consent that the same are to be submitted to the award of the umpire, except as hereinafter provided.

2. That the matter referred to in paragraph 6 of the said particulars is withdrawn from the reference herein.

3. The respondent undertakes to complete all titles to lands which have been selected by the claimant, and which have been *bonâ fide* sold or mortgaged.

4. All questions under paragraph 5 of the said particulars relating to the non-completion of such titles are withdrawn from this reference to arbitration.

5. That the objections made by the respondent to the completion of the titles above-mentioned were so made only to protect the rights of the Crown; and this memorandum of agreement is entered into without prejudice, and is not to be taken in any way an admission on the part of either the claimant or the respondent.

Dated at Wellington, this 19th day of December, 1895.

GEORGE HARRIS,
Claimant's Solicitor.
HUGH GULLY,
Crown Solicitor, on behalf of Respondent.

ANSWER TO CLAIMANT'S PARTICULARS OF CLAIM.

COLONY OF NEW ZEALAND.

In the Matter of an Arbitration between THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED), Claimant, and HER MAJESTY THE QUEEN, Respondent.

I. As to the claimant's particulars of matters referred, the respondent says:—

That the respondent repeats the allegations contained in the statement of respondent's case filed herein on the 23rd day of November, 1895.

II. As to the whole of the claimant's causes of action in all matters referred, the respondent says:—

1. That the claimant has broken its contract and cannot found any claim thereunder.

2. That the respondent has not committed any breach of the contract; but, even if the respondent had broken the said contract, the claimant is not entitled to rely upon such breach, on the grounds,—

(*a.*) That such breach or breaches did not go to the full consideration of the contract;

(*b.*) That the claimant has failed to elect to rescind upon any such breach;

(*c.*) That such breach has been waived.

3. That if the respondent has broken the said contract, the claimant has suffered no damage by such breach; but, on the contrary, would, if compelled to perform its said contract, suffer heavy loss.

4. That the claimant has not been and is not willing and able to perform its part of the said contract.

5. That the claimant has abandoned the said contract.

6. That the Arbitration Court has no power under the contract to award damages.

7. That the lines of railway have been taken possession of under the provisions of "The Railways Construction and Land Act, 1881," which excludes any right to arbitration under the contract.

III. As to the mining reservations, the respondent says:—

1. That the opinion of His Excellency the Governor under clause 16 of the contract is conclusive.

2. That the said reservations were duly and *bonâ fide* made under the contract, and that the claimant can only rely upon proof of *mala fides* on the part of the respondent.

3. That the said reservations are, in fact, auriferous within the proper interpretation of the said contract.

4. That if the said reservations have been made in excess or improperly, the said excess or impropriety did not excuse the breach by the claimant of the said contract.

5. That no damage to the claimant had accrued at the date of the institution of proceedings under the said reference.

6. That if any damage has accrued to the claimant, then such damage was not the cause of the claimant's breach of contract.

7. That the financial difficulties alleged to have been caused by the making of the said reservations—

(*a.*) Is in law too remote; and

(*b.*) Cannot be affected by any evidence extrinsic of the contract.

IV. As to clause 33 of the contract, the respondent says:—

1. That no applications under this clause were received and refused to be dealt with by the respondent except upon either one of two grounds,—

(*a.*) That the same were outside of the area of reservation delineated upon the said B1 plan; or

(*b.*) That the same included land required for *bonâ fide* mining purposes, or for one or more of the purposes referred to in subclauses (*a*), (*b*), (*c*), and (*d*) of clause 16 of the contract.

2. That the claimant Company itself refrained from completing all incomplete selections under this clause, on the ground that the purchase-money remains in a suspense account either until final selection of the whole block, according to the said B1 plan, or until the money is drawn out by the Company, without interest or profit.

3. That no damage has accrued to the claimant from any action or inaction by the respondent in respect of the said clause.

4. That if any damage did accrue, it did not justify the non-performance of the contract by the claimant.

V. If the claimant does not claim for general damages for breach of contract, but for specific items, then the respondent says:—

1. That the claimant is not entitled to compensation until—

(*a.*) The contract has been performed;

(*b.*) The damage, if any, has accrued.

2. The claimant is virtually suing upon an unperformed contract as upon a *quantum meruit*, and is not so entitled to sue, the contract not having been rescinded.

VI. As to the refusal by the Crown to complete titles to land selected by the company, the respondent says:—

1. That this question has been withdrawn from the reference by agreement of the parties.

VII. As to the refusals by the Crown to assent to selections by the company, the respondent says:—

1. That there have been no such refusals until after breach by the company, and after the expiration of the contract time.

VIII. As to all other matters referred, the respondent says:—

1. That they do not, nor does any one of them, disclose any valid claim.

(Filed 19th December, 1895.)

LETTER FROM UMPIRE *RE* AWARDS AND COSTS.

Hon. E. BLAKE, M.P., Q.C., to the CROWN SOLICITOR, Wellington.

SIR,— Wellington Club, Wellington, N.Z., 24th December, 1895.

I beg to notify you that I have made and published my awards as umpire in the reference of matters in dispute between the New Zealand Midland Railway Company (Limited) and the Queen; and that the awards and copies are deposited in the hands of George E. Tolhurst, Esq., Resident Inspector of the Union Bank of Australia, Wellington, to be delivered to the parties entitled to them on payment to him (whose receipt will be a discharge thereof) of the costs and charges of my umpirage and awards, which amount to £6,859, and whereof the particulars are as follows:—

	£	£
Fees and expenses of Sir Bruce Burnside, arbitrator appointed by the Compamy:—		
First reference	2,100	
Second reference	525	
In all, for Company's arbitrator	———	2,625
Fees and expenses of Sir Charles Lilley, arbitrator appointed by the Governor:—		
First reference	1,500	
Second reference	Nil.	
In all, for Crown's arbitrator	———	1,500
Fees and expenses of Edward Blake, umpire:—		
First reference (exclusive of £500 already paid in equal shares by the parties, as allowance for travelling-expenses) ...	2,000	
Paid Secretary to this arbitration, appointed by Sir Bruce Burnside and Sir Charles Lilley, the fee fixed by them...	210	
Paid Clerk and Proof-reader to the arbitration, appointed by direction of Sir Bruce Burnside and Sir Charles Lilley	24	
In all, for first reference...	2,234	
Second reference:—		
Fees and expenses	500	
In all, for umpire	———	2,734
Grand total		£6,859

I have, &c.,

EDWARD BLAKE, Umpire.

Hugh Gully, Esq.,
Solicitor for the Crown, Wellington, N.Z.

THE AWARD (FIRST REFERENCE).

WHEREAS by a deed bearing date the 3rd day of August, 1888, between HER MAJESTY THE QUEEN (who with her heirs and successors was therein and is hereinafter referred to as "the Queen") and THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED), a joint-stock company carrying on its business in the City of Christchurch in New Zealand and elsewhere (which was therein and is hereinafter referred to as "the Company"), an agreement was made for the construction and working of certain railways in New Zealand by the Company, and for certain grants and concessions to the Company by the Queen, and divers stipulations were entered into between the parties touching the premises:

And whereas the forty-seventh clause of the said deed is in the words following, that is to say:—

"It is hereby declared and agreed that, if at any time hereafter any dispute, difference, or question shall arise touching the construction, meaning, or effect of these presents, or any clause or thing herein contained, or the rights or liabilities of either of the said parties under these presents, or if the Queen and the Company shall be unable to come to an agreement within the meaning of clause 24 of these presents as to the proportional cost of any section of the said railway to be ascertained as aforesaid, or otherwise howsoever in relation to the premises, then every such dispute, difference, or question shall be referred to the arbitration of two indifferent persons, one to be appointed by each party to the reference, or an umpire to be appointed by the arbitrators in writing before entering on the business of the reference, and, if either party shall refuse or neglect to appoint an arbitrator within three months after the other party shall have appointed an arbitrator, and shall have served a written notice upon the first-mentioned party requiring such party to make an appointment, then the arbitrator appointed as aforesaid shall, at the request of the party appointing him, proceed to hear and determine the matters in difference as if he were an arbitrator appointed by both parties for that purpose; and the award or determination which shall be made by the said arbitrators or arbitrator, or of such umpire if the arbitrators shall disagree, shall be final and binding upon the said parties hereto respectively, so as such arbitrators or arbitrator shall make their or his award in writing within three months after the reference to them or him, or on or before any later day to which the said arbitrators or arbitrator by any writing signed by them or him shall enlarge the time for making their or his award, and so as such umpire shall make his award or determination in writing within one month next after the original or extended time appointed for making the award of the said arbitrators shall have expired, or on or before any later day to which the umpire shall by any writing signed by him enlarge the time for making his award; and also that no action or legal proceedings shall be commenced or prosecuted by either of the said parties hereto against the other of them touching any of the said matters in difference, unless the party to be made defendant to such action or proceedings shall have refused or neglected to refer such matters to arbitration pursuant to the provisions hereinbefore contained, or unless the time limited for making such award as aforesaid shall have expired without any such award being made; and also that all necessary witnesses on behalf of either of the parties to such reference, and all persons claiming through them respectively, shall submit to be examined by the said arbitrators, arbitrator, or umpire, upon oath or affirmation, in relation to the matters in dispute, and shall produce before the arbitrators, arbitrator, or umpire all books, deeds, maps, papers, accounts, writings, and documents within the possession or power of the said respective parties which may be required or called for, and do all other things which during the proceedings on the said reference the said arbitrators, arbitrator, or umpire may require, and that the witnesses on the reference shall, if the arbitrators, arbitrator, or umpire shall think fit, be examined on oath or affirmation; and that the costs of the reference and award shall be in the discretion of the arbitrators, arbitrator, or umpire, who may direct to and by whom and in what manner the same or any part thereof shall be paid; and that the submission to reference and any award made in pursuance thereof may, at the instance of either of the parties to the reference, and without any notice to the other of them, be made a rule or order of the Supreme Court of New Zealand: Provided that, if by the terms of any award made under any such reference as aforesaid any money shall in any manner be payable by the Queen or the Government to the Company, no attachment, or execution, or process in the nature thereof, shall be issued by or on behalf of the Company upon any rule or order of the Supreme Court as aforesaid unless and until the Governor shall on behalf of the Queen at as early a date as practicable have taken all such steps as may be necessary to have such money specially appropriated by the General Assembly to satisfy such award, and the payment of such money shall have been refused by the General Assembly: Provided also that nothing herein contained excepting the provision of clause 44 shall be deemed to control or interfere with any provision for arbitration contained in the said Act or the principal Act."

And whereas the Company did, pursuant to the said clause, appoint Sir Bruce Lockhart Burnside, Knight, an arbitrator for the purpose of an arbitration to be held under the said clause in order to determine certain disputes, differences, and questions which had arisen touching the construction, meaning, and effect of the said deed and the rights of the Company thereunder, and otherwise in relation to the matters set forth therein; and did also give notice thereof in writing to the Governor of New Zealand, and require him on behalf of the Queen to appoint an arbitrator for the purpose of such arbitration:

And whereas on the 28th day of March, 1895, the Governor of New Zealand did, pursuant to the said clause, appoint Sir Charles Lilley, Knight, an arbitrator for the purpose of such arbitration:

And whereas the said arbitrators did, on the 9th day of April, 1895, by writing signed by them, duly enlarge the time for making the award under the said reference (hereinafter called "the first reference") until the 30th day of January, 1896:

And whereas the said arbitrators did, on the 22nd day of November, 1895, before entering on the business of the first reference, by writing signed by them, duly appoint me, the Honourable Edward Blake, Q.C., M.P., to be umpire in respect of the first reference:

And whereas the said arbitrators took upon themselves the burden of the first reference, and heard the allegations and contentions of the parties on the matters in difference between them, which matters in difference arose not later than the 14th day of January, 1895, and are specified in the following claim of the Company, which was laid by the Company before the said arbitrators as, and was submitted by the Company and admitted by the Queen (without prejudice, however, to the Queen's right to contend as to any such matters that they were not within the scope of the arbitration clause) as comprising every matter in difference within the scope of the first reference, that is to say :—

"The Company claims as follows :—

"1. That the undertaking of the Company being work to be remunerated in part by land, as provided by clause 16 of the contract, the Queen, contrary to the provisions of the said contract, refused and prevented the exercise by the Company of its rights of selection over large areas of land within the authorised area.

"2. That if any lands were properly reserved under subclause (*c*) of clause 16, then the Company was hindered and prevented in the exercise of its rights under clause 18 by being refused the right to the timber on such lands.

"3. That the Queen has, in contravention of the contract, permitted and authorised the destruction and the removal of timber on lands available for selection, and thereby depreciated the value of such lands.

"4. That the Queen, in contravention of the contract, refused to give effect to the requests of the Company under clause 33 to sell or let lands within the authorised area in the Nelson and Westland Land Districts on the western side of the main range of mountains.

"5. That the remuneration of the Company being to the extent of £1,250,000 'B 1' value in land (as the work of construction should proceed) the Queen (by and through the Parliament of the colony) by greatly increased and graduated taxation on land, imposed subsequent to the date of the contract and without any exception in favour of the lands over which the Company had the right of selection, materially reduced the consideration of the contract and destroyed confidence in the undertaking of the Company as a commercial enterprise.

"6. That the Queen, by withholding for an unreasonable time consent to the deviation of the railway-line from the western to the eastern side of Lake Brunner, and to the substitution of the incline for the tunnel line at Arthur's Pass, delayed and prevented the Company from proceeding with the works under the contract.

"7. That the Queen, by further withholding for an unreasonable time consideration of the application of the Company for an extension of time under clause 42 of the contract, prevented the Company from raising the capital necessary to complete the railway and to perform its other obligations, and to realise the benefits and rights conferred on it by the contract.

"8. That the Queen, in derogation of the contract, by and through the Executive of the colony, and particularly by the false and defamatory statements of the Minister for Public Works in October, 1892, before a Select Committee of the House of Representatives (which statements became a part of the public records of the colony), made it impossible for the Company to raise the capital necessary to complete the railway, and to perform its other obligations, and to realise the benefits and rights conferred on it by the contract.

"9. That the Company, being formed for the purpose of constructing a railway on the system of land-grants as provided by "The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884," and as expressed in the contract between the parties, and being thus known to the Queen as a company which would have to raise money from time to time by share or debenture capital, or both, to enable it to carry out the contract, was by reason of the premises prejudiced, and prevented from raising the capital necessary to complete the railway and to perform its other obligations, and from realising the benefits and rights conferred on it by the contract.

"That by and in relation to the foregoing matters the credit of the company has been destroyed, and consequently it has been prevented from completing the railway, and that thereby it has lost the whole of the share capital subscribed, together with the profits reasonably to be expected thereon, and has lost the whole of the debenture capital raised and expended, with interest thereon, and also other moneys and credits, amounting to the sum of £1,584,900, which sum the Company accordingly claims to recover from the Queen."

And whereas the said arbitrators disagreed finally respecting the matters comprised in the first reference, and on the 29th November, 1895, notified to me such disagreement, whereby the matters so comprised came before me as umpire for award and determination :

Now know ye that I, the said Edward Blake, having taken upon myself the burden of the first reference as umpire, and having been attended by the parties and their witnesses, and heard and considered the allegations and proofs of the parties, do make this my award and determination in writing of and concerning the premises in manner following, that is to say :—

(*a*.) I find and award that the Company has not any claim against the Crown, or any right to recover any sum of money from the Crown in respect of the premises :

(*b*.) I award that each of the parties shall bear and pay their own costs of the reference, and that as between themselves each of the parties shall bear and pay the fees and expenses of the arbitrator nominated by such party (which fees and expenses are included in the costs and charges of my umpirage and award) ; and that as between themselves each of the parties shall bear and pay one-half of the remaining costs and charges of my umpirage and award.

As witness my hand at Wellington, New Zealand, this 24th day of December, 1895.

Signed and published on the day and year last above mentioned in the presence of—
E. V. BLAKE.

EDWARD BLAKE.

THE AWARD (SECOND REFERENCE).

WHEREAS by a deed bearing date the 3rd day of August, 1888, between HER MAJESTY THE QUEEN (who with her heirs and successors was therein and is hereinafter referred to as "the Queen") and THE NEW ZEALAND MIDLAND RAILWAY COMPANY (LIMITED), a joint-stock company carrying on its business in the City of Christchurch in New Zealand and elsewhere (which was therein and is hereinafter referred to as "the Company"), an agreement was made for the construction and working of certain railways in New Zealand by the Company, and for certain grants and concessions to the Company by the Queen, and divers stipulations were entered into between the parties touching the premises:

And whereas the forty-seventh clause of the said deed is in the words following, that is to say:—

"It is hereby declared and agreed that, if at any time hereafter any dispute, difference, or question shall arise touching the construction, meaning, or effect of these presents, or any clause or thing herein contained, or the rights or liabilities of either of the said parties under these presents, or if the Queen and the Company shall be unable to come to an agreement within the meaning of clause 24 of these presents as to the proportional cost of any section of the said railway to be ascertained as aforesaid, or otherwise howsoever in relation to the premises, then every such dispute, difference, or question shall be referred to the arbitration of two indifferent persons, one to be appointed by each party to the reference, or an umpire to be appointed by the arbitrators in writing before entering on the business of the reference, and, if either party shall refuse or neglect to appoint an arbitrator within three months after the other party shall have appointed an arbitrator, and shall have served a written notice upon the first-mentioned party requiring such party to make an appointment, then the arbitrator appointed as aforesaid shall, at the request of the party appointing him, proceed to hear and determine the matters in difference as if he were an arbitrator appointed by both parties for that purpose; and the award or determination which shall be made by the said arbitrators or arbitrator, or of such umpire if the arbitrators shall disagree, shall be final and binding upon the said parties hereto respectively, so as such arbitrators or arbitrator shall make their or his award in writing within three months after the reference to them or him, or on or before any later day to which the said arbitrators or arbitrator by any writing signed by them or him shall enlarge the time for making their or his award, and so as such umpire shall make his award or determination in writing within one month next after the original or extended time appointed for making the award of the said arbitrators shall have expired, or on or before any later day to which the umpire shall by any writing signed by him enlarge the time for making his award; and also that no action or legal proceedings shall be commenced or prosecuted by either of the said parties hereto against the other of them touching any of the said matters in difference, unless the party to be made defendant to such action or proceedings shall have refused or neglected to refer such matters to arbitration pursuant to the provisions hereinbefore contained, or unless the time limited for making such award as aforesaid shall have expired without any such award being made; and also that all necessary witnesses on behalf of either of the parties to such reference, and all persons claiming through them respectively, shall submit to be examined by the said arbitrators, arbitrator, or umpire, upon oath or affirmation, in relation to the matters in dispute, and shall produce before the arbitrators, arbitrator, or umpire all books, deeds, maps, papers, accounts, writings, and documents within the possession or power of the said respective parties which may be required or called for, and do all other things which during the proceedings on the said reference the said arbitrators, arbitrator, or umpire may require, and that the witnesses on the reference shall, if the arbitrators, arbitrator, or umpire shall think fit, be examined on oath or affirmation; and that the costs of the reference and award shall be in the discretion of the arbitrators, arbitrator, or umpire, who may direct to and by whom and in what manner the same or any part thereof shall be paid; and that the submission to reference and any award made in pursuance thereof may, at the instance of either of the parties to the reference, and without any notice to the other of them, be made a rule or order of the Supreme Court of New Zealand: Provided that, if by the terms of any award made under any such reference as aforesaid any money shall in any manner be payable by the Queen or the Government to the Company, no attachment, or execution, or process in the nature thereof, shall be issued by or on behalf of the Company upon any rule or order of the Supreme Court as aforesaid unless and until the Governor shall on behalf of the Queen at as early a date as practicable have taken all such steps as may be necessary to have such money specially appropriated by the General Assembly to satisfy such award, and the payment of such money shall have been refused by the General Assembly: Provided also that nothing herein contained excepting the provision of clause 44 shall be deemed to control or interfere with any provision for arbitration contained in the said Act or the principal Act."

And whereas the Company, having theretofore made one reference (hereinafter called "the first reference") under the said clause, did pursuant to the said clause appoint Sir Bruce Lockhart Burnside, Knight, an arbitrator for the purpose of an arbitration to be held under the said clause (hereinafter called "the second reference") in order to determine certain disputes, differences, and questions which had arisen touching the construction, meaning, and effect of the said deed and the rights of the Company thereunder, and otherwise in relation to the matters set forth therein; and did also give notice thereof in writing to the Governor of New Zealand and require him on behalf of the Queen to appoint an arbitrator for the purpose of such arbitration:

And whereas on the 21st day of September, 1895, the Governor of New Zealand did, pursuant to the said clause, appoint Sir Charles Lilley, Knight, an arbitrator for the purpose of such arbitration:

And whereas the said arbitrators did, on the 27th day of November, 1895, before entering on the business of the second reference, by writing signed by them duly appoint me, the Honourable Edward Blake, Q.C., M.P., to be umpire in respect of the second reference:

And whereas the said arbitrators took upon themselves the burden of the second reference, and heard the allegations and contentions of the parties on the matters in difference between them, which matters in difference arose subsequent to the 14th day of January, 1895, and were specified

in the following claim of the Company, which was laid by the Company before the said arbitrators as, and was submitted by the Company and admitted by the Queen (without prejudice, however, to the Queen's right to contend as to any such matters that they were not within the scope of the arbitration clause) as comprising every matter in difference within the scope of the second reference, that is to say:—

"The Company claims as follows:—

"1. That the undertaking of the Company being work to be remunerated in part by land, as provided by clause 16 of the contract, the Queen, contrary to the provisions of the said contract, refused and prevented the exercise by the Company of its rights of selection over large areas of land within the authorised area.

"2. That the Queen has, in contravention of the contract, permitted and authorised the destruction and the removal of timber on lands available for selection, and thereby depreciated the value of such lands.

"3. That the Company being entitled to select under the provisions of the contract land to the amount of £19,304, and having given notice in that behalf, the Queen by the Minister for Public Works, on or about the 20th day of April, 1895, refused to allow the Company to exercise its rights.

"4. That the Company being entitled to select lands, the Queen under agreement with the Company having sold certain such lands, being those described in the B 1 map as 'Nelson Towns: Reefton' (196 sections in number), and having received the proceeds thereof (the particulars of which have been refused to the Company) has in contravention of the contract refused to pay over the same to the Company.

"5. That the Queen, on the 25th day of May, 1895, in contravention of the contract and without any due or proper cause, took possession and assumed the management of the railway then in the possession of the Company, and wrongfully converted the same to her own use.

"That by and in relation to the foregoing matters the Company has lost the entire benefit of the contract and all the expenditure thereunder. Wherefore the Company claims to recover from the Queen the sum of £1,817,900, together with interest at 5 per cent. per annum upon £845,000 debenture capital, from the 14th day of January, 1895, till the date of award."

And whereas the said arbitrators disagreed finally respecting the matters comprised in the second reference, and on the 29th day of November, 1895, notified to me such disagreement, whereby the matters so comprised came before me as umpire for award and determination:

And whereas I did on the second day of December, 1895, by writing signed by me, duly enlarge the time for making my award under the second reference until the 30th day of January, 1896:

Now know ye that I, the said Edward Blake, having taken upon myself the burden of the second reference as umpire, and having been attended by the parties and their witnesses, and having heard and considered the allegations and proofs of the parties, do make this my award and determination in writing of and concerning the premises in manner following, that is to say:—

(*a.*) As to the claims numbered 1 and 2, I find and award that the Company has not any claim against the Crown, or any right to recover any sum of money from the Crown in respect of the said claims:

(*b.*) As to the claims numbered 3 and 4, I certify that the parties have consented and agreed before me, and I find and award that the Company is entitled to exercise the right of selecting under the provisions of the contract blocks of land up to the B 1 value of £21,066, and is entitled in *pro tanto* satisfaction of the exercise of such right of selection to take the proceeds of the sales which have been made by the Queen of "Nelson Towns, Reefton" lands now in suspense account; the lands sold being charged to the Company at the B 1 value thereof:

(*c.*) As to the claim numbered 5, I certify that it was declared and agreed by the Company during the second reference that my powers under the arbitration clause were limited to and were in fact those which would have been vested in a Judge of the Supreme Court on an application under the 124th section of the Act of New Zealand, 45 Victoria, numbered 37 (1881), and that no claim for damages could be maintained in the premises; and I find and award that there was such unreasonable and inexcusable delay by the Company in the prosecution of the works connected with the railways, and also that there was on the part of the Company such a wilful breach of the contract between the Company and the Queen, as on either ground to justify the exercise of the power of the Governor to take possession and assume the management of the railways; and that, in my opinion, the power conferred by the 123rd section of the said Act was rightly exercised; and I find that the Company has not any claim against the Crown, or any right to recover any sum of money from the Crown in respect of the said claim numbered five:

(*d.*) And I certify that each of my findings hereinbefore stated and lettered (*a*), (*b*), and (*c*) is a separate and distinct finding upon the matters therein comprised, and is in no way dependent on any other of such findings:

(*e.*) I award that each of the parties shall bear and pay their own costs of the reference; and that, as between themselves, each of the parties shall bear and pay the fees and expenses of the arbitrator nominated by such party (which fees and expenses are included in the costs and charges of my umpirage and awards); and that, as between themselves, each of the parties shall bear and pay one-half of the remaining costs and charges of my umpirage and awards.

As witness my hand at Wellington, New Zealand, this 24th day of December, 1895.

Signed and published on the day and year last above mentioned in the presence of—
E. V. BLAKE.

EDWARD BLAKE.

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