

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Coates (the Receiver for Debenture Holders of the New Zealand Midland Railway Company, Limited,) v. The Queen, from the Supreme Court of New Zealand; delivered 17th February 1900.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD MORRIS.

LORD SHAND.

LORD DAVEY.

LORD ROBERTSON.

[*Delivered by Lord Macnaghten.*]

The controversy between the parties to this Appeal turns upon the true construction of two Statutes of the Legislature of New Zealand—“The Railways Construction and Land Act “1881” and “The East and West Coast (Middle “Island) and Nelson Railway and Railways “Construction Act 1884.” The question in substance is whether the right of the Crown under the Act of 1881 to retain possession of the railway which the New Zealand Midland Railway Company Limited began to construct but were unable to finish is or is not subject to a charge in favour of the holders of debentures issued by the Company.

The Company was formed in England under the Companies Act 1862 for the purpose of constructing and working the railway. Its nominal capital was 500,000*l.* but it had unlimited borrowing powers. The contract for the construction of the railway which was subject to

the provisions of the Acts of 1881 and 1884 was made under the authority of the Midland Railway Contract Act 1887 between Her Majesty the Queen represented by the Governor of the one part and the Company of the other. The railway was to be completed within 10 years from the 17th of January 1885. The proposed line was about 235 miles in length. It was intended to connect the east and west coasts of the Middle Island and at each extremity to form a junction with Government railways then in operation. The total estimated cost was 2,500,000*l.* In aid of the enterprise Her Majesty agreed to deliver to the Company possession of all lands then in the possession and at the disposal of the Crown required for the purposes of the undertaking and also to grant to the Company out of the public domain as the works proceeded and successive sections of the line were completed lands of the value of 50 per cent. of the total estimated cost of construction.

The Company raised 745,000*l.* by the issue of debentures and began the work of construction. In 1894 about 75 miles of the railway were completed. The cost of the work actually completed was according to the estimate in the Contract 470,000*l.* and the Company received from the Crown grants of public land to the extent of 50 per cent. of that sum. Early in the year 1894 the operations of the Company came to a standstill. The period fixed for the completion of the railway expired in January 1895. In the following May under the powers of the Act of 1831 Sec. 123, the Governor took possession of the railway and assumed the management of the part which had been completed and went on with the construction of the line. In accordance with the provisions of that section accounts were rendered half yearly showing the amounts expended and received by the Government and the balances due from the Company. For

a time the Company or the debenture holders in the name of the Company satisfied the demands of the Government out of the proceeds of sale of their land grants. The last payment was in respect of the accounts for the period between the 1st of March and the 31st of August 1897 and was made on the 26th of January 1898. Since that date nothing whatever has been paid by or on behalf of the Company to the Government and there is a large sum now due.

It is not disputed that the Governor was acting within the powers conferred upon him by Section 123 of the Act of 1881 in taking possession of the railway and assuming the management thereof and proceeding with the works. Nor can it be denied that the Company have failed to make good public moneys expended on the line which by their contract and the Act of 1881 they were bound to repay. The only question is whether there is anything to prevent the Governor availing himself of the further powers conferred upon him by Sections 125 and 126 of the Act of 1881 and thereby acquiring an absolute title to the railway to the exclusion of the Company and its debenture holders.

Sections 125 and 126 of the Act of 1881 are in the following terms:—

“ Section 125. If the Company for the space of one year
 “ after the Governor has taken possession * * * shall
 “ fail to repay all sums of public money which have been
 “ expended in or towards completing the said railway and the
 “ equipment thereof and all sums of public money which
 “ shall have been expended on the repair or management of
 “ the railway or in connection therewith in excess of the
 “ receipts therefrom it shall be lawful for the Governor at any
 “ time after the expiration of the one year to give three
 “ months notice to the Company that he intends to retain the
 “ the said railway as Government property.

“ Section 126. On the publication of an Order in Council
 “ at any time after the expiration of the said three months
 “ to the effect that possession has been taken as aforesaid and
 “ will be permanently retained by the Government the said

“ railway and stations and all plant equipments and appur-
“ tenances belonging thereto shall unless a satisfactory
“ arrangement be in the meantime made between the Govern-
“ ment and the Company become and be absolutely vested in
“ Her Majesty the Queen without any conveyance or transfer
“ whatsoever.”

It seems that on the 9th of May 1898 after the half-yearly accounts from the 1st of September 1897 to the 28th of February 1898 had been rendered the Governor gave notice of his intention to retain the Railway as Government property. But in order that the question which it was known the debenture holders intended to raise might not be prejudiced the Governor very properly abstained from issuing any Order in Council. It must therefore be taken for the purposes of this case that the Governor is rightfully in possession and that the Company are in default but that no further step has been taken on behalf of the Government to exclude the Company and the debenture holders.

It appears to their Lordships that up to this point the case is perfectly clear. The Company have only a determinable interest in the railway. Owing to their default the Governor is now in a position to determine their interest. When their interest is determined all rights depending upon the title of the Company must fall with it. The power conferred upon the Governor to declare his intention to retain the Railway as Government property means nothing unless it means that the Railway is to be retained as property belonging to the Governor for the use of the public and for no other use or purpose whatever free from all charges and encumbrances created by the defaulting Company. When the Governor takes the formal step of publishing an Order in Council his title on behalf of the public will be absolute and complete. It appears therefore to their Lordships that unless there be some special

provision negating this view and giving the debenture holders a right independent of the title of the Company and superior to the right of the Governor their claim must fail.

It was argued on behalf of the debenture holders that such a provision is to be found expressed or implied in the Act of 1884. It therefore becomes necessary to refer to that enactment.

The Act of 1881 was a general Act. The Act of 1884 which refers to the Act of 1881 as "the principal Act" specially authorised the construction of the railway which the New Zealand Midland Railway Company was afterwards formed to construct. Some of the provisions of the Act of 1881 were repealed. Others were modified in favour of the promoters of the proposed railway. But Sections 123-126 were left untouched and are therefore by Section 18 of the Act of 1884 to "have full force and effect in respect of the railway to be constructed under the authority of" that "Act and the Company constructing the same."

Among the provisions of the Act of 1881 repealed by the Act of 1884 was a group of sections relating to the borrowing of money. The borrowing powers in the Act of 1884 which took their place authorised the Company "from time to time" to borrow such sum or sums of money as might be necessary for completing the construction of the railway and for that purpose to issue debentures. And the enactment goes on to declare that all such debentures and the interest payable thereon shall be "a first charge on the entire assets of the Company including the railway and everything pertaining thereto." Some reliance was placed on the words "from time to time" which do not seem to have much bearing on the

question. But the main argument was rested on the declaration that the debentures should be a first charge on the railway. It was contended that those words made the claim of the debenture holders paramount to the rights of the Government. But the answer is that the right of the Government under Sections 125 and 126 of the Act of 1881 is not a charge on the railway and does not interfere with the priority of the charge in favour of the debenture holders over other creditors of the Company. The right of the Government is the right in case of default on the part of the Company to take possession of the railway and retain it as Government property.

An argument on the part of the debenture holders was founded on the provisions of the Act of 1884 authorising debenture holders in case of default in payment of principal or interest to apply to the Court for the sale of such part of the Company's property as was liable under the provisions of the Act for the payment of the money and in the meantime for the appointment of a receiver. Those provisions, however, are evidently intended to apply as between the Company and its creditors and do not interfere or purport to interfere with the paramount rights of the Government. It is not necessary to consider whether under any circumstances it would be competent for the debenture holders to enforce the sale of part of the line and so break up and disintegrate the railway. But their Lordships as at present advised see no reason to differ from the conclusion of the Supreme Court sitting in banco which is adverse to any such contention.

It was under these latter provisions of the Act of 1884 that the proceedings were taken which have given rise to this Appeal. The debenture holders

applied for a sale of the completed portion of the railway and the other property of the Company on which their debentures were charged. An order was made by arrangement and without argument in accordance with the prayer of the petition. On appeal to the Supreme Court that order was restricted so as to exclude any property being or forming part of the railway as defined by the Act of 1881 and any property forming part of or attached to the railway or used in connection therewith as appurtenant to the same. The order of the Supreme Court was affirmed on appeal.

Their Lordships are of opinion that the view of the learned Judges of the Supreme Court and the Court of Appeal was perfectly correct and they will therefore humbly advise Her Majesty that this Appeal ought to be dismissed.

The Appellant will pay the costs of this Appeal.

