

1900.  
NEW ZEALAND.

# MIDLAND RAILWAY:

## ACTION BY DEBENTURE-HOLDERS.

JUDGMENT OF THE PRIVY COUNCIL AND HER MAJESTY'S ORDER-IN-COUNCIL.

*Laid upon the Table by the Hon. Mr. Hall-Jones, with the Leave of the House.*

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.

*[Delivered by Lord Macnaghten.]*

PRESENT at the hearing: The Lord Chancellor, Lord Macnaghten, Lord Morris, Lord Shand, Lord Davey, Lord Robertson.

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, 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 ten years from the 17th 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. 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 by the issue of debentures and began the work of construction. In 1894 about seventy-five miles of the railway were completed. The cost of the work actually completed was, according to the estimate in the contract, £470,000, 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 1881, section 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 March and the 31st August, 1897, and was made on the 26th 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 :—

“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 said railway as Government property.

“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 appurtenances belonging thereto, shall, unless a satisfactory arrangement be in the meantime made between the Government 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 May, 1898, after the half-yearly accounts from the 1st September, 1897, to the 28th 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.

---

ORDER IN COUNCIL.

At the Court at Windsor Castle, the 3rd day of March, 1900.

Present :

[Seal.]

THE QUEEN'S MOST EXCELLENT MAJESTY ;  
LORD CHANCELLOR ; LORD PRESIDENT ; LORD JAMES OF HEREFORD.

WHEREAS there was this day read at the Board a report from the Judicial Committee of the Privy Council, dated the 17th February, 1900, in the words following, viz. :—

“ Your Majesty having been pleased by your general Order in Council of the 29th November, 1898, to refer unto this Committee the matter of an appeal from the Court of Appeal of New Zealand (Wellington District), between James Hugh Buchanan Coates, the Receiver for the debenture-holders of the New Zealand Midland Railway Company (Limited), appellant, and your Majesty the Queen, respondent, and likewise a humble petition of the appellant, setting forth that by a deed dated the 17th January, 1885, and made between your Majesty of the one part and William Chrystall and others (therein collectively referred to as ‘ the contractors ’) of the other part, in pursuance of the provisions of ‘ The Railways Construction and Land Act, 1881 ’ (hereinafter called ‘ the general Act ’), and of ‘ The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884 ’ (hereinafter called ‘ the special Act ’), the contractors were authorised and undertook to construct and work a line of railway to connect the east and west coasts of the Middle Island from Springfield to Brunnerton, and also a further line of railway from Brunnerton to near Belgrove (which two several lines of railway are hereinafter referred to as ‘ the said railway ’): that during the year 1889 the New Zealand Midland Railway Company (Limited), in exercise of its borrowing-powers, issued £745,000 first-mortgage debentures, and expended the money so borrowed on the construction of the said railway: that delay in the prosecution of the works having been committed by the company, the Governor of New Zealand, purporting to act under section 123 of the general Act, on or about the 25th May, 1895, in the name of the Crown, took possession of the said railway so far as constructed by the company, and has proceeded with the construction thereof: that on or about the 30th May, 1898, Clement Horace Thomas Peter Moir and Henry Cowie (who are holders of certain of the said debentures so issued as aforesaid), in their own names but acting on behalf of all the said debenture-holders, applied by petition to the Supreme Court of New Zealand (Wellington District), under section 14 of the special Act, that the property liable under the provisions of the special Act for the payment of the money intended to be secured by the said debentures should be sold, and that in the meantime a Receiver of the rents, income, and profits of such property should be appointed: that by an order of the said Supreme Court, made upon the said petition on the 4th July, 1898, the property of the company in New Zealand mentioned in the said order, including the said railway, was directed to be sold, but the order contained a provision that the sale should not be proceeded with without further order in that behalf of a Judge of the said Court, of which due notice should be given to the Crown Solicitor at Wellington, and the appellant was appointed Receiver of the rents, income, and profits of the company: that on the 28th July, 1898, the solicitor of the Crown gave notice that a motion would be made to the said Supreme Court sitting in Banco on behalf of the Crown to rescind the said order of the 4th July, 1898: that on the 5th October, 1898, the appellant, as Receiver, issued a summons asking that the Crown should show cause why the said order of the 4th July, 1898, for the sale of the property of the company in New Zealand, should not be carried out, and the Crown Solicitor duly appeared upon the hearing of the said summons: that the said motion and summons were heard by the said Supreme Court sitting in Banco at Wellington, and the said Court, on the 4th February, 1899, made an order varying the order of the 4th July, 1898, by limiting the appointment of the Receiver and the order for sale to the property of the company other than the railway as defined by section 2 of ‘ The Railways Construction and Land Act, 1881, ’ and subject to such variation the said order of the 4th July, 1898, was confirmed, and the Receiver was ordered to pay to the Crown £105 for the costs of the motion, and the said summons was dismissed with costs: that the appellant, being dissatisfied with the said order of the Supreme Court of the 4th February, 1899, appealed therefrom to the Court of Appeal of New Zealand: that the hearing of the appeal took place on or about the 24th April, 1899, when it was adjudged that the appeal should be dismissed with costs on the highest scale: that the appellant, feeling himself aggrieved by the said judgment of the Court of Appeal, moved the said Court for leave to appeal to your Majesty in Council, which leave was granted on the 25th May, 1899, upon conditions which have since been duly complied with: And humbly praying that your Majesty in Council will be pleased to take this appeal into consideration, and that the said judgment of the Court of Appeal of New Zealand of the 24th April, 1899, may be reversed, altered, or varied, or for other relief in the premises :

“ The Lords of the Committee, in obedience to your Majesty’s said general Order in Council, have taken the said humble petition and appeal into consideration, and, having heard counsel on behalf of the parties on both sides, their Lordships do this day agree humbly to report to your

Majesty, as their opinion, that the judgment of the Court of Appeal of New Zealand, sitting at Wellington, dated the 24th day of April, 1899, ought to be affirmed, and this appeal dismissed.

“And in case your Majesty should be pleased to approve of this report, and to dismiss the said appeal, then their Lordships do direct that there be paid by the appellant to the Crown the costs of this appeal incurred in the said Court of Appeal, and the sum of four hundred pounds three shillings and fourpence sterling for the costs thereof incurred in England.”

Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said judgment of the Court of Appeal of New Zealand, sitting at Wellington, dated the 24th day of April, 1899, be and the same is hereby affirmed, and that this appeal be and the same is hereby dismissed, and the appellant is to pay to the Crown the costs of this appeal incurred in the said Court of Appeal, and the sum of four hundred pounds three shillings and fourpence sterling for the costs thereof incurred in England. Whereof the Governor, Lieutenant-Governor, or Commander-in-Chief of the Colony of New Zealand for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

A. W. FITZROY.

*Approximate Cost of Paper.*—Preparation, not given; printing 1,976 copies), £2 6s. 6d.

---

By Authority: JOHN MACKAY, Government Printer, Wellington.—1900.

*Price 3d.*]