

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