

#### IV.—CONSTITUTION OF THE COMPANY AND DIFFICULTY OF DISTINCTION BETWEEN SHAREHOLDERS AND DEBENTURE-HOLDERS.

That, I think, concludes all I have to say on the class of claim founded on the charges of the want of good faith; but I wish, with your permission, to point out how difficult it is for the debenture-holders to separate themselves from the company in this matter. I shall not take long in making this point.

The company is of a curious constitution, which has become common of late years. Companies are now sometimes formed with practically no capital. Seven shareholders sign the memorandum; fully paid shares are issued in exchange for the property acquired by the company, and its capital is provided by debentures charged on the property. The debenture-holders are, of course, not liable to calls, and if their security is sufficient they get their interest without risk. In general practice, however, debentures are only issued to the extent of the uncalled capital, so that the debenture-holder has not only a security on the property, but also the personal liability of the shareholders to satisfy his claims. A person lending money on debentures to a company of the latter class need not carefully scrutinise the nature of the property which is mortgaged to him. He has behind it the liability of the shareholders. But any person buying the debentures of a company of the class first described is bound to carefully consider what property the company has to mortgage to him. That is all he can get. The company's personal liability is non-existent. If this company had been like the Manawatu Railway Company with a large uncalled capital the present distinction between the claim of the debenture-holders and the company could not have arisen, for the debenture-holders would get their money from the company. It is only because they have no remedy against the company that they claim the contract work which is in process of completion in competition with the Government, whose right against the company is beyond question. How can the Government be liable to the debenture-holders? The Government did not issue the prospectus, or issue the debentures. Nor did the Government of the colony make any representations to the debenture-holders. The debenture-holders may have a grievance against the company and its directors. I dare say they have. But how can they and the company, in equity and morally, combine to remedy that grievance by depriving the colony of its rights? When the company issued the debentures it had not a shilling of uncalled capital, and it has never since raised any share-capital. So that it was a company of the class I have first described. When the company can raise no more money, cannot complete its contract, and becomes liable to the exercise of the powers of the Governor, then it turns to its mortgagees and says, "If you claim as yours the part constructed we will aid you, and that although 50 per cent. of the cost of it has been provided by the colony. We cannot claim that it is ours, but you, as our mortgagees, may be able to make out that it is yours." It is difficult to understand how any one could suppose that mortgagees, claiming under documents issued by the mortgagor, can have a higher right than the mortgagor. But the point was not one which could be misunderstood. The debentures were issued in 1889. In February, 1888, the Privy Council had decided in London the very point in a precisely similar case—a Government charter to a railway company, expressly giving the company the power to mortgage its railway-line. The case is reported in Appeal Court Cases, page 199, and at page 209 their Lordships say,—

*Extract from Government of Newfoundland v. Newfoundland Railway Company. (XIII., A.C., p.p. 209-210.)*

The assignees, indeed, contend that the Act of 1881 and the company's charter contain provisions which, in any controversy with the Government, place them in a better position than the company. The charter contemplates that the company will borrow money, and says that it may do so, and may issue bonds upon the faith of the corporate property. But their Lordships cannot find any indication throughout the whole of the documents which should lead a lender of money to think that the corporate property is anything more than what the company may justly claim, or that he is in any other way to stand on higher ground than the borrower.

This is the Newfoundland case, which, as I have already stated to the Committee, I shall refer to later on on another point relating to the liability of the mortgagees to a set-off of damages suffered by the Government. But my present point is different. The investors of the British public had invested their money in this undertaking on the representations of the directors of the company, and, as you can see by the dates, this judgment of the Privy Council could not have been unknown to them. I say that the assertion on the part of the Government in this matter is of the same right as that which was asserted by the Government of Newfoundland, and was determined in favour of that colony by the judgment of the Privy Council before the issue of these debentures, and that the contention now raised by the debenture-holders in respect of this railway—namely, that they, as assignees of the company, have a higher right than the company itself—is the very contention which was held to be untenable in that case.

#### V.—THE REPLY TO THE CLAIM THAT, WITH THE MONEY OF THE COMPANY AND OF THE DEBENTURE-HOLDERS, A PART OF A PUBLIC WORK HAS BEEN CONSTRUCTED WHICH HAS PASSED TO THE POSSESSION OF THE CROWN, AND THAT THE CROWN IN FAIRNESS OUGHT TO PAY THE VALUE OF IT.

I now turn to the other class of claim. This claim is founded, as I have already indicated, upon the assertion that we have the railway without cost to the colony. They say, "The company has failed to complete their contract, and the debenture-holders have lost their money, and the Government has the railway, and is going to complete it. Therefore you should pay us for the money which we have expended on the line." Assuming that to be a fair and equitable basis on which to found a claim, the question becomes one for a jury, apart altogether from the suggestion that the colony owes any duty of any kind to those people who constructed the line, or to their mortgagees. It is a question of how much this railway is worth to us, having regard to what we have already paid, and to the damage we have suffered through the non-completion of the line. The first question is, what is to be the measure of estimate? As I put it at the commencement of