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PRENDERGAST, C.J. :—

Under the authority of several Acts of the General Assembly power was given to the Government of New Zealand to contract for the construction and working of a Railway—spoken of as the Midland Railway—of a length of about 230 miles—connecting a Government line of railway on the west coast of the Middle Island with a Government line of railway on the East Coast, and with another Government line in Nelson Province, on the north of that Island.

The principal consideration for the contract to construct and work the line of railway was to be grants of Crown land, with provision for making such grants by instalments as the construction proceeded and the constructed parts became ready for working. As a security for the due prosecution of the construction and for the due working of the constructed line or parts, the Government had power in certain events, expressed in one of the Acts and in the contract, to take possession of the railway, and, so far as not completed, to complete it; and, if the default was in not duly working it, to work it; this power of taking possession, &c., being also exercisable generally in case of any wilful breach or non-performance of the contract. Provision was, however, also made for charging the contractors with the expenditure incurred by the Government in the exercise of this power; provision was also made enabling the contractors to appeal in a summary way to a Judge of the Supreme Court against the exercise by the Government of these powers. If after notice to the contractors and the lapse of a specified time the contractors failed to reimburse the Government its expenditure, or an agreement was come to between the Government and the contractors, the Government was to remain in possession of the railway.

But in one of the Acts relating to the subject—that of 1884—there are provisions enabling any Company that should be the contractor to give security over the property of the Company, including the railway, by way of mortgage or mortgage-debentures, such debentures to rank *pari passu*, and to be a "first charge." Power is given to debenture-holders, in case of non-payment of principal or interest, to apply to the Supreme Court for the appointment of a Receiver, and for leave to the Receiver to sell "absolutely" such part of the charged property of the Company as the Court might think fit, and to pay the debenture-holders out of the proceeds. The estimated cost of the whole line was about two millions and a half; upwards of three-quarters of a million has been borrowed by the contracting Company, which was formed in England. The Company constructed about one-third of the whole length, this one-third being the least costly part of the whole line to construct and work. Then, about three years ago the Company ceased carrying out the contract as to construction from want of capital. The Government thereupon, in exercise of its powers, took possession of the whole railway, including the completed parts, and has proceeded with the construction of the line and the working of the completed parts; and now, after the lapse of three years, the debenture-holders apply for the appointment of a Receiver and for the sale of the completed part of the line. The contractors have received the stipulated instalments of land-grants. A Receiver was appointed, such appointment being made without prejudice to the right of the Crown thereafter to contest the right of the debenture-holders to have such appointment made in the circumstances. The order making the

appointment provided that the Receiver should not proceed to any sale without the further order of the Court. The case now comes before the Court on an application on behalf of the debenture-holders to proceed with the sale. The application, though not so expressed in the motion, was at the argument admitted to be for the absolute sale of the constructed part of the line, it being also admitted that an order for the sale of the whole concession and contract was not asked for—it was, in fact, contended that the debenture-holders had a right to so limit their application. At the same time a cross-motion was made on behalf of the Government for the rescission of the order appointing the Receiver so far as it authorised him to interfere with the railway, including rolling-stock.

The contention on behalf of the debenture-holders is based on the provision in the Act of 1884 that the debentures are a "first charge," and that, as contended by the terms of some of the provisions of this Act, the intention of the Legislature is manifested that the debenture-holders should have the security contended for—namely, a right to the absolute sale of any part or parts of the constructed line, discharged from the security given to the Government—which is the right to take possession of the line in the case of non-performance by the contracting party. For the Crown it was urged that the debenture-holders had, of course, notice by the Act and the contract between the Company and the Government of this power of the Government to take possession; that it would require the very clear expression of the Legislature's intention to enable the Court to authorise the sale of portions of the line and so to disintegrate it, and render the whole either impossible to work, or possible only to work so disadvantageously to the public interest as to be practically useless. It was also urged on behalf of the Government that the right to take possession was not a charge in the sense in which the word is used in the expression "first charge," but a stipulation necessary to secure the due completion of the line, and was part of the consideration given by the contractors for the contract, and the land-grants given and to be given.

It was, as I understand, admitted on behalf of the Government that the concession and contract as a whole might perhaps have been ordered to be sold if the debenture-holders had applied before the Company had practically abandoned their contract, but that, even if that were what the debenture-holders were asking for, it was now too late to ask for that. However, as the debenture-holders are not making that application, it is unnecessary to consider whether such an application would, in the circumstances, be successful: the liberty to sell the concession and contract, subject to the rights of the Government to take possession, would, in the present condition of things, be indisputably of no value to the debenture-holders.

By section 9 of the Act of 1884 the Company may borrow, on debenture, such sums as may be sufficient to complete the construction of the railway. The Government have no control over the amount to be borrowed: it might even be borrowed in one sum, and, if not in one sum, still the borrowing may be irrespective of the extent to which the works had progressed. By the 13th section of the same Act it is provided that the debentures and interest thereon shall be a "first charge on the entire assets of the Company, including the railway and everything pertaining thereto." By the interpretation clause in the Act of 1881, "railway" where used in the Act of 1881, and, as I infer, where used in the Act of 1884, and in the contract, means the railway constructed or proposed to be constructed under the contract, and includes the land on which it is constructed, and the buildings and rolling-stock and plant of every kind connected with it, and the contract or right to construct and work it.

By the 14th section of the same Act of 1884 it is provided that, where there has been a failure to pay principal or interest on debentures, then, at the instance of debenture-holders, a Judge of the Supreme Court may order that "such part of the Company's property as is liable under the provisions of that Act for the payment of the moneys shall be absolutely sold," and that the Judge may in the meantime appoint a Receiver of "the rents, income, and profits of such property," and the Receiver is to have all the powers of the Company for recovery "of tolls, rents, and other moneys."

By section 16 of the same Act no debenture-holder is to apply for a sale of "any portion" of the Company's property until notice has been given to the Governor, and the Governor fails to notify his intention "to purchase." This section does not express what property of the Company is in contemplation as being subject to the right of purchase by the Governor; it is not said whether the purchase contemplated is of "the portion" of the Company's property ordered to be sold or the whole property. The following section—section 17—makes provision that, if the Governor exercises the power of purchase conferred by the Act of 1881, and the railway or "any part thereof" purchased is charged with moneys borrowed by the Company, then, the Governor's purchase being subject to the charge, if the purchase-money is less than the charge the Company is to pay the Governor the difference between the purchase-money and the charge.

Section 114 of the Act of 1881 gives the Governor a right to purchase at any time after ten years after the completion of the line. This right, therefore, is a right to purchase the whole line, not a portion or section of it, whether constructed or not. The contract, however, gives an additional right to purchase, for section 43 of the contract provides that, in the events which the Acts of 1881 or 1884 or the contract empower the Governor to take possession of the railway "or any part thereof," the Governor may, in lieu of taking possession, exercise the right of purchase, and that he may exercise this new right of purchase notwithstanding that the whole line has not been completed; but still it is a right to purchase the whole, not parts, whether constructed or not. But this section in the contract inaccurately speaks of a right to take possession of "a part" of the railway, for the right is to take possession of the whole. The right of taking possession here referred to is that given by section 123 of the Act of 1881, and the right is to take possession and complete and work, subject to certain conditions. The events in which that right is exercisable are three: (1) Unreasonable or inexcusable delay in prosecuting the work; (2) not running trains as agreed upon the line or completed parts of the line; (3) any "wilful" breach of the contract.

It is to be observed, therefore, that, though the events in which there is a right to purchase are added to, the right is still a right to purchase the whole, not parts. For the purposes of the present case it may be conceded to the debenture-holders that the effect of section 16 of the Act of 1884 is to add another event in which the Governor has a right to purchase—namely, whenever application is made by debenture-holders for a sale. The intention of the Act probably is, not that the debenture-holders shall not be able to apply for a sale till ten years after the whole is completed, or till the Governor has a right to take possession, but that the Governor shall, in the event of a sale being applied for by debenture-holders whenever that might be, have the same right of purchase as he would have had in the case of any of the other events expressly provided for; the right, however, being to purchase the whole line, whether completed or not, at a price to be fixed by arbitration, in the mode provided by section 114, *et seq.*, of the Act of 1881.

Though section 17 of the Act of 1884 provides as to what is to be done in the event of the Governor purchasing "the railway," or any part thereof, being charged with borrowed moneys, it does not follow that the Legislature contemplated that parts of the line itself could be so charged; the interpretation of the word "railway" includes plant as well as rolling-stock. The explanation of the expression "any part thereof" being found in section 17 probably is that the section is a copy of the repealed section 76 of the Act of 1881, and in the repealed section of that Act a mortgage, with a power of sale, of part of the property of the Company, and perhaps part of which would by virtue of the interpretation come within the term "railway," was permitted. There is no other provision than section 17 in the Act of 1884 which lends colour to the notion that parts of the line itself could be charged and sold; by the Act the debentures are not chargeable on parts of the line, but are all charged on the "entire assets" of the Company. The debenture-holders' Trust Deed does certainly profess to give a security to the first issue of debentures over constructed portions of the line. The Government, however, are not concerned with the arrangements between the Company and the debenture-holders, and

their arrangements cannot work a disintegration of the railway. This, I suppose, was so apparent that attention was not, I think, drawn to this during the argument.

The expression "entire assets" of the Company seems to indicate that what was intended to be charged was that which should be the assets of the Company at the time when the powers given to the debenture-holders for enforcing payment came to be exercised.

It would not be contended for the debenture-holders that they are confined to the "assets" existing at the time of the issue of the debentures; on the other hand, it could not for them be contended that the Company is, by the issue of debentures charged by the Act on its entire assets, prohibited from carrying on its business in ordinary course. The result seems to be that, though all the assets present and future are charged, the charge of the debenture-holders was by the Act intended to be a floating security. The charge actually created by the debentures as issued, and the Trust Deed, gave only an ordinary floating security. In Wheatley *v.* Silkstone Coal Company (54 L.J. Ch. 778; L.R. 29 Ch.D. 715) the debentures were expressed to be a "first charge" on the undertaking, &c., and effects, present and future. It was held that it was a general floating security operating as a first charge against the general creditors of the Company over the property of the Company, as such property should exist at the time at which the debentures should come to be put in force. North, J., in his judgment, says, "If those debentures are, as contended, a first charge upon everything mentioned in them they would cover everything that was then or at any time might become the property of the Company. They would include every penny the Company had at the bank, every piece of property they had at the time, every sum they subsequently received in the course of carrying on the business of the Company; and there would be a charge upon that property which would give the debenture-holder the right to have it applied in satisfying them, and would prevent anybody receiving any part of the money, knowing the circumstances under which it was received, without being liable to repay it if called upon to do so. It seems to me impossible to say that that can be the meaning of the parties. In fact, it has not been contended that the debentures are to receive this construction, but it seems to me, if the words "first charge" are to have the meaning assigned to them, it would necessarily go the length that I have indicated. Now, it seems to me here to be clear, by virtue of the words used—a charge upon the undertaking, the property, and effects of the Company, both present and future, including everything that they might acquire—what was intended was that the parties holding the debentures should have the right of coming forward when the money was payable to them and saying that they had a first charge upon the property belonging to the Company at that time in priority to any other charge to be set up in the same way against it; that is to say, if the money became payable, not by the period of the loan elapsing, but—I merely take this as an instance—by winding up (because the loan then became payable), in that case it was to be a first charge as against the general creditors of the Company. But I do not think that the words "first charge" can mean a charge that shall prevent any person whatever, under any circumstances, even by virtue of the proper and *bonâ fide* exercise by the Company of the power of carrying on the undertaking, from receiving in priority any part of the assets of the Company which he might otherwise be entitled to receive without question. That construction seems to me to be one which I am bound to put on the document, not only from the construction of the document itself—because it seems to me impossible to say that the undertaking was to be tied up and stopped at once—but also from the decisions that have been arrived at by the Courts with regard to similar instruments."

In that case the Company had, after the issue of the debentures, but while it was carrying on its business, given an equitable mortgage, and it was held that, notwithstanding the words of the debentures making the debentures a first charge, the equitable mortgage was entitled to priority. In the present case it is not a question of priority between a newly created charge and the debentures, but whether the charge given by the Act to the

debentures is to be affected by the stipulations of the contract between the Company and the Government. In the case of ordinary debentures being floating charges, such charges are subject to charges newly created while the Company is carrying on business, but they are also subject to charges existing at the time when the debentures were issued, and of which the debenture-holders had notice. Therefore, even if the stipulation, giving the Governor power to take and hold possession, stands no higher than or could be properly spoken of as a charge, as the debenture-holders had undoubtedly notice of the statutory provision giving this power, the debenture-holders' rights are subject to this right of the Government to take possession and complete the railway, and to hold possession as security for outlay, and, if such outlay be not recouped, to permanently retain possession.

There is much to support the view that in the present case no more than a "floating charge" was intended by the Act to be created. But even if the contention made by the debenture-holders in this case were well founded, and a charge on the line itself was created, and that the constructed portion of the railway could be treated as a severable section of the line, and could be ordered to be sold, there is no provision in the Acts or contract which would enable that severed portion to be sold discharged from the claims of the Government against the Company which created the charge. In the Government of Newfoundland *v.* The Newfoundland Railway Company and Others (57 L.J. P.C. 35; L.R. 13 App. Cas. 199), though it was held that by the terms of the charter the contractors and the trustees for the bondholders were entitled to receive portions of the stipulated subsidy and land-grants in proportion to the completed section, notwithstanding that the contractors had failed to complete the whole line and had abandoned further performance of the contract, having, as in the present case, completed only the part most advantageous to the contractors, yet that, in an action in which the trustees of the bondholders were parties to enforce payment of the proportions of subsidy and land-grants, the Government could, on general principles, set off, as against the bondholders' claim for the said portions of the subsidy and land-grants, in respect of the sections of the line assigned to such trustees, damages for injuries sustained by the Government by reason of the non-completion by the contractors of other portions of the line not assigned to the trustees. This case is an authority, if such be needed, that the bondholders cannot claim to be in a better position than their assignors, the contractors.

On behalf of the trustees for the bondholders it was contended, in the case just referred to, that the assignees of parts of the railway were not bound as were their assignors the Company, and could claim their proportion of the subsidy without being liable to the Government for damage in respect of the breach of the contract as to the other parts of the line. With reference to the contention, their Lordships say, in their judgment, "The two claims (the claim of the Government and the claim of the trustees for the bondholders) have their origin in the same portion of the same contract, where the obligations which gave rise to them are intertwined in the closest manner. The claim of the Government does not arise from any fresh transaction freely entered into by it after notice of assignment by the Company. It was utterly powerless to prevent the Company from inflicting injury upon it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counterclaim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances, but their Lordships have no hesitation in saying that in this contract the claim for subsidy and for non-construction ought to be set against one another." These observations are applicable to the present case. The judgment is an authority for this: that, even if the contract and Acts had not conferred on the Governor power to take possession and complete or work, as the case may be, and charge the company with the outlay, and hold possession till the outlay be repaid, still the Governor would be so far secured that he would have a right to set off both as against the Company and even as against an

assignee of part damages for the breach of contract. In Young *v.* Kitchin (L.R. 3 Ex. Div. 127), cited in the judgment in the Newfoundland case, the assignee of money due under a building contract was so far affected by a breach of the contract before the assignment that he had to submit to a deduction for damages for the breach. In *In re* Roundwood Colliery Company (66 L.J. Ch. 195) debenture-holders were held to be affected by a special agreement entered into by the Company before the issue of the debentures affecting part of the security. There can be no doubt that the consideration given and agreed to be given to the Company was not for the construction of parts of the line, but the whole: the inducement to the Government to enter into the contract was the agreement by the Company to complete the whole and to work it. The right of the Government to complete the whole if the Company failed to do so was an important part of the consideration inducing the Government to enter into the contract with the Company, under whom the debenture-holders do undoubtedly claim, although the debenture-holders' rights are in some respects defined and secured to them by the statutes as well as by the contract. The contention made on behalf of the debenture-holders is that not only can the Court order a sale of the completed part in one lot, but that it might do so in several lots, and that a purchaser at the judicial sale of the whole completed part, or the several purchasers of the several parts, would be under no obligation to keep the line open for traffic, but that even the rails might be detached and sold; that, in short, the purchaser or purchasers would take what they purchased subject to none of the obligations imposed on the Company, and this notwithstanding that the Company had received a substantial part of the consideration in land-grants. It seems to me only necessary to state this contention in order to show how untenable is the whole case made on behalf of the debenture-holders.

In Redfield *v.* The Corporation of Wickham (L.R. 13 A.C. 467) their Lordships held that, as under the Act of the local Legislature provision was made for empowering assignees of a recognised section of a railway obtaining powers to work the assigned section, such a section could be seized in execution; but, nevertheless, referring to these legislative provisions, it is said, "They (the enactments) do not suggest that, according to the policy of the Canadian law, a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgment creditors, or contractors, or encumbrancers." It may be that, as the Act of 1881 expressly permits the lease, sale, or parting with the railway, the railway as a whole—the whole undertaking—might be sold, and the principle in Gardner *v.* The London, Chatham, and Dover Railway Company (L.R. 2 Ch. App. 201) may not apply to the present railway as a whole. In the judgment in Redfield *v.* The Corporation of Wickham it was, I think, the opinion of their Lordships that but for the local legislation making provision as to recognised sections inconsistent with the principle in Gardner *v.* The London, Chatham, and Dover Railway, that principle would, as contended by the unsuccessful appellant in Redfield *v.* The Corporation of Wickham, have been held applicable. In Grey and Another *v.* The Manitoba and North-western Railway (66 L.J. P.C. 16) it was also held that, though a recognised division of the railway could be the subject of a judicial sale at the instance of mortgagees, yet such division could not itself be disintegrated. In the present case there is, I think, in the Acts no recognition of "sections," certainly none of the completed portion as a section. A question might perhaps have arisen as to whether the line from Brunner to Foxhill might not be treated as a line separate from that from Brunner to Springfield, for the interpretation of the term "railway" in the contract speaks of several lines. However, that question does not arise, and the interpretation is certainly inconsistent with the provisions of the contract and the Acts of 1881 and 1884.

In my opinion, the introduction of the words "or any part thereof" (meaning of the railway) in section 17 of the Act of 1884 are without significance; at any rate, there is nothing in the Acts or contract giving these words the important significance contended for, which is no less than that, contrary to all principles, the railway could at the instance of the debenture-holders be disintegrated. As to the construction of the words "or any part thereof" in paragraph 43 of the

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By the 14th section of the same Act of 1884 it is provided that, where there has been a failure to pay principal or interest on debentures, then, at the instance of debenture-holders, a Judge of the Supreme Court may order that "such part of the Company's property as is liable under the provisions of that Act for the payment of the moneys shall be absolutely sold," and that the Judge may in the meantime appoint a Receiver of "the rents, income, and profits of such property," and the Receiver is to have all the powers of the Company for recovery "of tolls, rents, and other moneys."

By section 16 of the same Act no debenture-holder is to apply for a sale of "any portion" of the Company's property until notice has been given to the Governor, and the Governor fails to notify his intention "to purchase." This section does not express what property of the Company is in contemplation as being subject to the right of purchase by the Governor; it is not said whether the purchase contemplated is of "the portion" of the Company's property ordered to be sold or the whole property. The following section—section 17—makes provision that, if the Governor exercises the power of purchase conferred by the Act of 1881, and the railway or "any part thereof" purchased is charged with moneys borrowed by the Company, then, the Governor's purchase being subject to the charge, if the purchase-money is less than the charge the Company is to pay the Governor the difference between the purchase-money and the charge.

Section 114 of the Act of 1881 gives the Governor a right to purchase at any time after ten years after the completion of the line. This right, therefore, is a right to purchase the whole line, not a portion or section of it, whether constructed or not. The contract, however, gives an additional right to purchase, for section 43 of the contract provides that, in the events which the Acts of 1881 or 1884 or the contract empower the Governor to take possession of the railway "or any part thereof," the Governor may, in lieu of taking possession, exercise the right of purchase, and that he may exercise this new right of purchase notwithstanding that the whole line has not been completed; but still it is a right to purchase the whole, not parts, whether constructed or not. But this section in the contract inaccurately speaks of a right to take possession of "a part" of the railway, for the right is to take possession of the whole. The right of taking possession here referred to is that given by section 123 of the Act of 1881, and the right is to take possession and complete and work, subject to certain conditions. The events in which that right is exercisable are three: (1) Unreasonable or inexcusable delay in prosecuting the work; (2) not running trains as agreed upon the line or completed parts of the line; (3) any "wilful" breach of the contract.

It is to be observed, therefore, that, though the events in which there is a right to purchase are added to, the right is still a right to purchase the whole, not parts. For the purposes of the present case it may be conceded to the debenture-holders that the effect of section 16 of the Act of 1884 is to add another event in which the Governor has a right to purchase—namely, whenever application is made by debenture-holders for a sale. The intention of the Act probably is, not that the debenture-holders shall not be able to apply for a sale till ten years after the whole is completed, or till the Governor has a right to take possession, but that the Governor shall, in the event of a sale being applied for by debenture-holders whenever that might be, have the same right of purchase as he would have had in the case of any of the other events expressly provided for; the right, however, being to purchase the whole line, whether completed or not, at a price to be fixed by arbitration, in the mode provided by section 114, *et seq.*, of the Act of 1881.

Though section 17 of the Act of 1884 provides as to what is to be done in the event of the Governor purchasing "the railway," or any part thereof, being charged with borrowed moneys, it does not follow that the Legislature contemplated that parts of the line itself could be so charged; the interpretation of the word "railway" includes plant as well as rolling-stock. The explanation of the expression "any part thereof" being found in section 17 probably is that the section is a copy of the repealed section 76 of the Act of 1881, and in the repealed section of that Act a mortgage, with a power of sale, of part of the property of the Company, and perhaps part of which would by virtue of the interpretation come within the term "railway," was permitted. There is no other provision than section 17 in the Act of 1884 which lends colour to the notion that parts of the line itself could be charged and sold; by the Act the debentures are not chargeable on parts of the line, but are all charged on the "entire assets" of the Company. The debenture-holders' Trust Deed does certainly profess to give a security to the first issue of debentures over constructed portions of the line. The Government, however, are not concerned with the arrangements between the Company and the debenture-holders, and

their arrangements cannot work a disintegration of the railway. This, I suppose, was so apparent that attention was not, I think, drawn to this during the argument.

The expression "entire assets" of the Company seems to indicate that what was intended to be charged was that which should be the assets of the Company at the time when the powers given to the debenture-holders for enforcing payment came to be exercised.

It would not be contended for the debenture-holders that they are confined to the "assets" existing at the time of the issue of the debentures; on the other hand, it could not for them be contended that the Company is, by the issue of debentures charged by the Act on its entire assets, prohibited from carrying on its business in ordinary course. The result seems to be that, though all the assets present and future are charged, the charge of the debenture-holders was by the Act intended to be a floating security. The charge actually created by the debentures as issued, and the Trust Deed, gave only an ordinary floating security. In Wheatley *v.* Silkstone Coal Company (54 L.J. Ch. 778; L.R. 29 Ch.D. 715) the debentures were expressed to be a "first charge" on the undertaking, &c., and effects, present and future. It was held that it was a general floating security operating as a first charge against the general creditors of the Company over the property of the Company, as such property should exist at the time at which the debentures should come to be put in force. North, J., in his judgment, says, "If those debentures are, as contended, a first charge upon everything mentioned in them they would cover everything that was then or at any time might become the property of the Company. They would include every penny the Company had at the bank, every piece of property they had at the time, every sum they subsequently received in the course of carrying on the business of the Company; and there would be a charge upon that property which would give the debenture-holder the right to have it applied in satisfying them, and would prevent anybody receiving any part of the money, knowing the circumstances under which it was received, without being liable to repay it if called upon to do so. It seems to me impossible to say that that can be the meaning of the parties. In fact, it has not been contended that the debentures are to receive this construction, but it seems to me, if the words "first charge" are to have the meaning assigned to them, it would necessarily go the length that I have indicated. Now, it seems to me here to be clear, by virtue of the words used—a charge upon the undertaking, the property, and effects of the Company, both present and future, including everything that they might acquire—what was intended was that the parties holding the debentures should have the right of coming forward when the money was payable to them and saying that they had a first charge upon the property belonging to the Company at that time in priority to any other charge to be set up in the same way against it; that is to say, if the money became payable, not by the period of the loan elapsing, but—I merely take this as an instance—by winding up (because the loan then became payable), in that case it was to be a first charge as against the general creditors of the Company. But I do not think that the words "first charge" can mean a charge that shall prevent any person whatever, under any circumstances, even by virtue of the proper and *bonâ fide* exercise by the Company of the power of carrying on the undertaking, from receiving in priority any part of the assets of the Company which he might otherwise be entitled to receive without question. That construction seems to me to be one which I am bound to put on the document, not only from the construction of the document itself—because it seems to me impossible to say that the undertaking was to be tied up and stopped at once—but also from the decisions that have been arrived at by the Courts with regard to similar instruments."

In that case the Company had, after the issue of the debentures, but while it was carrying on its business, given an equitable mortgage, and it was held that, notwithstanding the words of the debentures making the debentures a first charge, the equitable mortgage was entitled to priority. In the present case it is not a question of priority between a newly created charge and the debentures, but whether the charge given by the Act to the

debentures is to be affected by the stipulations of the contract between the Company and the Government. In the case of ordinary debentures being floating charges, such charges are subject to charges newly created while the Company is carrying on business, but they are also subject to charges existing at the time when the debentures were issued, and of which the debenture-holders had notice. Therefore, even if the stipulation, giving the Governor power to take and hold possession, stands no higher than or could be properly spoken of as a charge, as the debenture-holders had undoubtedly notice of the statutory provision giving this power, the debenture-holders' rights are subject to this right of the Government to take possession and complete the railway, and to hold possession as security for outlay, and, if such outlay be not recouped, to permanently retain possession.

There is much to support the view that in the present case no more than a "floating charge" was intended by the Act to be created. But even if the contention made by the debenture-holders in this case were well founded, and a charge on the line itself was created, and that the constructed portion of the railway could be treated as a severable section of the line, and could be ordered to be sold, there is no provision in the Acts or contract which would enable that severed portion to be sold discharged from the claims of the Government against the Company which created the charge. In the Government of Newfoundland *v.* The Newfoundland Railway Company and Others (57 L.J. P.C. 35; L.R. 13 App. Cas. 199), though it was held that by the terms of the charter the contractors and the trustees for the bondholders were entitled to receive portions of the stipulated subsidy and land-grants in proportion to the completed section, notwithstanding that the contractors had failed to complete the whole line and had abandoned further performance of the contract, having, as in the present case, completed only the part most advantageous to the contractors, yet that, in an action in which the trustees of the bondholders were parties to enforce payment of the proportions of subsidy and land-grants, the Government could, on general principles, set off, as against the bondholders' claim for the said portions of the subsidy and land-grants, in respect of the sections of the line assigned to such trustees, damages for injuries sustained by the Government by reason of the non-completion by the contractors of other portions of the line not assigned to the trustees. This case is an authority, if such be needed, that the bondholders cannot claim to be in a better position than their assignors, the contractors.

On behalf of the trustees for the bondholders it was contended, in the case just referred to, that the assignees of parts of the railway were not bound as were their assignors the Company, and could claim their proportion of the subsidy without being liable to the Government for damage in respect of the breach of the contract as to the other parts of the line. With reference to the contention, their Lordships say, in their judgment, "The two claims (the claim of the Government and the claim of the trustees for the bondholders) have their origin in the same portion of the same contract, where the obligations which gave rise to them are intertwined in the closest manner. The claim of the Government does not arise from any fresh transaction freely entered into by it after notice of assignment by the Company. It was utterly powerless to prevent the Company from inflicting injury upon it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counterclaim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances, but their Lordships have no hesitation in saying that in this contract the claim for subsidy and for non-construction ought to be set against one another." These observations are applicable to the present case. The judgment is an authority for this: that, even if the contract and Acts had not conferred on the Governor power to take possession and complete or work, as the case may be, and charge the company with the outlay, and hold possession till the outlay be repaid, still the Governor would be so far secured that he would have a right to set off both as against the Company and even as against an

assignee of part damages for the breach of contract. In Young *v.* Kithchin (L.R. 3 Ex. Div. 127), cited in the judgment in the Newfoundland case, the assignee of money due under a building contract was so far affected by a breach of the contract before the assignment that he had to submit to a deduction for damages for the breach. In *In re* Roundwood Colliery Company (66 L.J. Ch. 195) debenture-holders were held to be affected by a special agreement entered into by the Company before the issue of the debentures affecting part of the security. There can be no doubt that the consideration given and agreed to be given to the Company was not for the construction of parts of the line, but the whole: the inducement to the Government to enter into the contract was the agreement by the Company to complete the whole and to work it. The right of the Government to complete the whole if the Company failed to do so was an important part of the consideration inducing the Government to enter into the contract with the Company, under whom the debenture-holders do undoubtedly claim, although the debenture-holders' rights are in some respects defined and secured to them by the statutes as well as by the contract. The contention made on behalf of the debenture-holders is that not only can the Court order a sale of the completed part in one lot, but that it might do so in several lots, and that a purchaser at the judicial sale of the whole completed part, or the several purchasers of the several parts, would be under no obligation to keep the line open for traffic, but that even the rails might be detached and sold; that, in short, the purchaser or purchasers would take what they purchased subject to none of the obligations imposed on the Company, and this notwithstanding that the Company had received a substantial part of the consideration in land-grants. It seems to me only necessary to state this contention in order to show how untenable is the whole case made on behalf of the debenture-holders.

In Redfield *v.* The Corporation of Wickham (L.R. 13 A.C. 467) their Lordships held that, as under the Act of the local Legislature provision was made for empowering assignees of a recognised section of a railway obtaining powers to work the assigned section, such a section could be seized in execution; but, nevertheless, referring to these legislative provisions, it is said, "They (the enactments) do not suggest that, according to the policy of the Canadian law, a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgment creditors, or contractors, or encumbrancers." It may be that, as the Act of 1881 expressly permits the lease, sale, or parting with the railway, the railway as a whole—the whole undertaking—might be sold, and the principle in Gardner *v.* The London, Chatham, and Dover Railway Company (L.R. 2 Ch. App. 201) may not apply to the present railway as a whole. In the judgment in Redfield *v.* The Corporation of Wickham it was, I think, the opinion of their Lordships that but for the local legislation making provision as to recognised sections inconsistent with the principle in Gardner *v.* The London, Chatham, and Dover Railway, that principle would, as contended by the unsuccessful appellant in Redfield *v.* The Corporation of Wickham, have been held applicable. In Grey and Another *v.* The Manitoba and North-western Railway (66 L.J. P.C. 16) it was also held that, though a recognised division of the railway could be the subject of a judicial sale at the instance of mortgagees, yet such division could not itself be disintegrated. In the present case there is, I think, in the Acts no recognition of "sections," certainly none of the completed portion as a section. A question might perhaps have arisen as to whether the line from Brunner to Foxhill might not be treated as a line separate from that from Brunner to Springfield, for the interpretation of the term "railway" in the contract speaks of several lines. However, that question does not arise, and the interpretation is certainly inconsistent with the provisions of the contract and the Acts of 1881 and 1884.

In my opinion, the introduction of the words "or any part thereof" (meaning of the railway) in section 17 of the Act of 1884 are without significance; at any rate, there is nothing in the Acts or contract giving these words the important significance contended for, which is no less than that, contrary to all principles, the railway could at the instance of the debenture-holders be disintegrated. As to the construction of the words "or any part thereof" in paragraph 43 of the

contract, the words have, I think, no bearing on the present question. If only part of the line had been constructed, the Governor, when he took possession, might properly be said to take possession of that part, though the effect would be to take possession not only of the completed part, but of all the property of the Company falling within the interpretation of the term "railway," including the concession or right to construct and work the line. In the argument on behalf of the bondholders it was urged that the Legislature, by expressly providing in the 52nd section of the Act of 1881 that mortgages should be subject to the right of purchase reserved to the Governor by the Act, was inferentially a provision that such mortgages should be subject to no other right reserved to the Governor under the contract or in the Acts. In my opinion, the provision was introduced only for caution's sake. It is, I think, impossible to conclude that no other terms of the contract or provisions in the Act were to affect mortgages issued under the Act of 1881. But section 52 of the Act of 1881 is repealed as to the railway in the present case; and, even as to mortgages under the Act of 1881, it is clear from other provisions in that Act that it was quite unnecessary to make any such express declaration. However, in the Act of 1884 there is no similar provision expressly saving the Governor's right of purchase, though it is clear from the provision that the debenture-holders' rights are subject to this reserved power.

It was also urged that the express provision (3) in sections 11 and 12 of the Act of 1884, that debenture-holders and other creditors of the Company are to have no claim against the revenues of the colony, and that there should be a notification of this on the debentures, showed that other provisions of the Act or contract subjecting the charged property to liabilities were not to apply to bondholders. But here, again, it is, I think, clear that, without any such provision as those in sections 11 and 12, the revenues of the colony would not have been legally liable to bondholders or other creditors for defaults of the Company. Similar provisions are to be found with regard to other loans authorised by statutes. The object of such a provision is to prevent lenders and other creditors setting up a pretended moral claim based on the circumstance that the authority to borrow is given by statute.

I have already dealt with the argument based on the provision that the debentures are to be a "first charge" on the entire assets of the Company. It is unnecessary to consider whether, even if the bondholders were asking for a sale of the entire railway subject to the Governor's rights arising out of his having taken possession, such an application could in the circumstances have succeeded.

The application made on behalf of the Receiver and bondholders must be refused, and the application on behalf of the Governor allowed—that is, restricting the operation of the order for the appointment of a Receiver to such assets of the Company as do not include the railway and rolling-stock. If it is intended that the Receiver shall take possession of, and deal with any property other than the railway and rolling-stock, or that there should be a sale, the order should, I think, be amended, defining more particularly what the Receiver can deal with and what can be sold.

The Crown is entitled to the costs of both applications, to be paid by the Receiver.

EDWARDS, J.:—

This is, in form, a motion to rescind or vary an order made by me, on the motion of certain holders of debentures issued by the Company, for the sale of the Company's property in New Zealand. The order in question is, however, merely a formal order, made at the request of all parties without argument or consideration, in order that the matters in debate between the parties might be determined in the course of further proceedings. The matter, therefore, now

comes before the Court for consideration for the first time. There is also a summons by the Receiver for leave to proceed upon the order.

On the undisputed facts it appears (omitting antecedent matters, which have become immaterial) that the Company entered into a contract, dated 3rd August, 1888, with the Crown for the construction (clause 2) of a line of railway to connect at Springfield, in Canterbury, and at Brunnerton, in Westland, with existing Government railways, and also of a further line of railway from a point on the first-mentioned line of railway at or near Brunnerton, by way of Reefton, to a point at or near Belgrove, in the Provincial District of Nelson, to connect with an existing Government line there. This contract was entered into under the authority of "The Midland Railway Contract Act, 1887," and the questions to be determined in these proceedings arise upon the construction of that Act and contract, and of "The Railways Construction and Land Act, 1881," and "The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884."

Clause 2 of the contract refers to "a line of railway" and "a further line of railway." Both lines are referred to in the subsequent clauses of the contract as "the said railway"; but the interpretation clause (1) of the contract provides that that expression shall mean "the two several lines of railway from Springfield to Brunnerton and from Brunnerton to Belgrove mentioned in these presents, and to be constructed, maintained, and worked in accordance therewith, with all necessary buildings, works, and appliances requisite for working the same." It appears, therefore, that the contract is to be treated as a contract for two separate lines. It is, however, an indivisible contract for the construction of both lines.

Annexed to the contract is a plan, on which, treating both lines as a whole, the railway is shown as being divided into sections numbered from 1 to 35 consecutively, beginning at Springfield and ending at Belgrove. These sections are referred to in several clauses of the contract, such as clause 10, referring to the working of completed sections; clause 13, enabling the Crown under certain conditions to require the Company to construct first any particular section; clause 14, enabling the Company to decline to work any section while the railway remains uncompleted.

The main purpose of the division into sections is, however, that shown by clause 25, which entitles the Company to grants from the Crown from time to time of lands in respect of each completed section of the railway. Clause 24 provides for the ascertainment of the relative estimated cost of the construction of each section to the total estimated cost of £2,500,000 for the construction of the whole railway; and under this clause the Company became entitled to grants of land to a value equal to 50 per cent. of the estimated cost of each such constructed section.

There is nothing in any of these provisions to justify the contention that any single section of the railway, or any number of such sections less than the whole, can be treated as being complete in itself or themselves, apart from the whole work. On the contrary, the provisions of clauses 10 and 14, and, in fact, the whole tenor of the contract, are quite inconsistent with that view.

Under this contract the Company contracted with the Crown (clause 2) to construct and completely finish both lines of railway within ten years from the 17th January, 1885. The contract contains a provision (clause 42) enabling the Governor in Council to extend the period for the construction of the railway in certain events, but no such extension has been granted.

The Company began the work of construction in the year 1887, and in the year 1894 had constructed portions of both lines—from Brunnerton to Reefton, on the Brunnerton–Belgrove line, and from Brunnerton to Jackson's, on the Brunnerton–Springfield line—these constructed portions forming a continuous railway from Reefton to Jackson's. The total length of line constructed was seventy-five miles out of the 235 miles provided for by the contract, and was by far the easiest and least expensive portion of the work contracted for. The cost of the constructed portion, estimated as provided by the contract, was £470,300, and the Company had in the year 1894 received from the Crown grants of land to the extent of 50 per cent. of this sum, as provided by the contract.

Early in the year 1894 the Company ceased the work of construction, and in the month of May, 1895, the Governor, in pursuance of the powers conferred upon him by "The Railways Construction and Land Act, 1881," section 123, took possession and assumed the management of the constructed part of the railway, and since then has continued in such possession and management. The Governor has also continued the construction of the line, and has rendered accounts to the Company showing the amounts expended and received by him. For some time the Company paid the amounts appearing by such accounts to be due by it, but there are at present moneys claimed to be due by the Company to the Crown on such accounts. The period of one year mentioned in section 125 of the Act of 1881 has, however, apparently not expired.

It is not contested in these proceedings that, as between the Crown and the Company, the acts done by the Governor on behalf of the Crown are lawful, but it is contended that the debenture-holders have a first charge upon the railway, overriding the rights given to the Crown under sections 123–126 of "The Railways Construction and Land Act, 1881," and that they are entitled to an order for the absolute sale, free from any right or claim of the Crown, of the constructed portion of the railway, and of all the plant, rolling-stock, &c., used in connection with it.

This contention is mainly founded upon the wording of sections 9–17 of the Act of 1884, No. 15, which empower the Company to raise money upon debentures upon certain conditions; and especially upon the wording of section 13, which provides 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."

It was contended by counsel for the debenture-holders that this provision gives to the debenture-holders a charge upon the constructed portion of the line paramount to the rights reserved to the Crown by section 123 of the Act of 1881, No. 37, and that they have a right to an absolute sale of the constructed portion of the line, free from all conditions; that they may, if they please, cause the rails to be torn up and disposed of as old iron, and the land upon which the railway is constructed to be sold for grazing or any other purposes. It appears to me that this contention is entirely without foundation.

The purpose of the statutes under consideration, and of the contract entered into subject to them, plainly is that facilities should be given for the construction, by private enterprise, of a railway which should serve the public purposes of the colony. To this end provision is made by clause 11 of the contract that, so soon as the railway or any section thereof had been surveyed, the Crown should put the Company into possession of all lands then in the possession and at the disposal of the Crown for the purposes of the construction of the railway, and of any land adjacent thereto which might be required for side-cuttings, &c., or for the protection of the railway, or for workshops, stations, &c. Provision is also made for granting to the Company, out of the public estate, lands of the value equal to 50 per cent. of the total estimated cost of the construction of the railway. Provision is further made by section 123 of the Act of 1881 enabling the Governor, in the event of unreasonable or inexcusable delay in the prosecution of the works, or in the event of neglect to run trains at the times and in manner fixed by the regulations made under the statutes, or in the event of a wilful breach of the contract, to take possession and assume the management of the railway, and, if he should think fit, to complete the same, and conduct the traffic thereon, charging the Company with all outlay and expenditure which may be entailed, and crediting the company with all earnings and receipts. In this event there is to be paid by the Governor to the Company, or by the Company to the Governor, as the case may require, the balance appearing on such accounts. The Governor is also empowered to restore the railway to the Company, or to waive any breach of contract, upon such terms as he may think fit. Provision is also made for an appeal to the Supreme Court against any act done by the Governor in pursuance of these provisions. There is also provision that if the Company shall, for the space of one year after the Governor shall have taken possession under these powers, fail to repay all

moneys payable under the foregoing provisions, the Governor may thereafter give to the Company three months' notice that he intends to retain the railway as public property, and that on publication at any time after such three months of an Order in Council to the effect that possession has been taken as aforesaid, and will be permanently retained by the Government, the railway and stations, and all plant, equipments, and appurtenances belonging thereto, shall, unless a satisfactory arrangement be in the meantime come to between the Government and the Company, become and be absolutely vested in the Crown. Provision is also made by sections 114–120 of the Act of 1881 enabling the Crown to purchase the railway, at a price to be fixed by arbitration, as therein provided.

These provisions are such as might be expected in such a scheme for the purpose of safeguarding the public interests with respect to a railway to be constructed to a large extent at the expense of the public estate. They are admittedly binding upon the Company, and it would, in my opinion, require the clearest possible language to show that they are not binding upon the mortgagees of the Company, but that the mortgagees may, as has been contended on their behalf, so deal with the constructed portion of the railway as not only to frustrate the entire object of the scheme contemplated by the Legislature, and by the parties to the contract, and to render entirely useless the large expenditure of the public estate which has already taken place with respect to such constructed portion, but also to render it extremely difficult, if not impossible, for the Crown in the future to construct a railway to serve the purpose of the railway contracted for.

In my opinion the language of the statutes not only does not support the contention of the debenture-holders, but actually negatives it.

Under the section principally relied upon (section 13, Act of 1884, No. 15) it is provided that the debentures shall be "a first charge upon the entire assets of the Company, including the railway and everything pertaining thereto." Stress is laid upon the words "first charge," which it is contended indicate that the debenture-holders are to have a charge upon the constructed portion of the railway paramount to the rights of the Crown under sections 123–126 of the Act of 1881.

The debenture-holders are to have a first charge, but a first charge upon what? Upon the entire assets of the Company, including the railway and everything pertaining thereto. Then, what are the entire assets of the Company, and what is the meaning of the words, "including the railway and everything pertaining thereto"? The entire assets of the Company cannot, in my opinion, be held to include anything which would not, if not mortgaged, be assets of the Company for payment of the debts due by the Company to its unsecured creditors, or for distribution among the shareholders in a liquidation, after all the debts of the Company had been paid. Plainly the constructed portion of the railway under this contract does not come within this definition. It is, in fact, admitted that this is so, for it is not contested that the rights of the Crown under sections 123–126 of the Act of 1881 prevail against the Company, and therefore against the general body of creditors, to whom it cannot be suggested that any larger rights are given than are given to the Company.

Then, do the words "including the railway and everything pertaining thereto" extend the meaning of the words "the entire assets of the Company" in the manner contended by counsel for the debenture-holders? It seems to me to be clear that they do not, for, according to the grammatical meaning of the words, the railway and everything pertaining thereto are only included in so far as they are assets of the Company.

There are other reasons which enforce the same conclusion. Under the interpretation clause of the Act of 1881 the word "railway" means "any railway, and the land whereon the same is constructed, or that may be used therewith, and includes all works, buildings, rolling-stock, machinery, and plant of every kind connected therewith which may be proposed to be or may be constructed by or under the provisions of this Act from a given point or place to another given point or place, and includes the right to construct or work the same (as the case may require), and, where not inconsistent with the context, all the

powers and privileges belonging or appertaining thereto." Under the interpretation clause of the Act of 1884 (No. 15), section 2, the words "railway" or "the said railway" in that Act are made to mean the East and West Coast (Middle Island) line of railway, which is the railway in question in these proceedings. It is plain, however, from the provisions of the Act of 1884 that this definition is merely for the purpose of limiting the operation of the statute to the railway in question, and that with respect to that railway the definition given by the Act of 1881 still remains. This is shown by section 17, which refers to the power of the Crown to purchase the railway under the provisions of the Act of 1881, obviously using that word in the meaning given to it by the Act of 1881. Moreover, it is specially provided by the repealing clause of the Act of 1884, section 18, that the provisions of the Act of 1881 "shall have full force and effect with respect to the railway to be constructed under the authority of this Act, and the Company constructing the same, except as herein is specially provided in modification thereof."

The word "railway," where used in section 13 of the Act of 1884, therefore includes the concession or right to construct and work the railway, and the whole operation of that section is, in the events which have happened, to give the debenture-holders a charge over such concession or right. This concession or right is strictly part of the assets of the Company, and the section, so read, is consistent and grammatical. There is a reason for the special reference to the "railway," as that word is interpreted in the Act of 1881, in section 13 of the Act of 1884, for, since the case of Gardner *v.* The London, Chatham, and Dover Railway Company (2 Ch. App. 201), it has been settled law that an undertaking of this character cannot, in the absence of statutory authority to that effect, be sold or transferred, nor can the powers or duties be delegated to or discharged by any other company or person than the Company or person to whom the concession has originally been made. Moreover, the Act of 1881, section 122, impliedly forbids the transfer of the undertaking without the consent of the Governor. Here the intention was that the debenture-holders should have a power of sale extending to the concession granted to the Company, subject to the special provisions for the protection of the public interests which are contained in sections 14–16 of the Act of 1884, and accordingly section 13 properly contains a special reference to the railway.

The concession or right of the Company to construct the railway under the contract may therefore properly be sold, or might have been sold, but for matters which have not been argued, and which perhaps do not fully appear in the proceedings; for on the part of the Crown it is not disputed that an order might, while the contract was subsisting, have been made for sale of the concession, though it is alleged that it is now too late to ask for such an order; while on the part of the debenture-holders it is stated that such an order would be valueless, and that they do not wish that it should be made.

Any sale which might have been made of the concession or right of the Company under the contract must, of course, have been made subject to the provisions of the contract and of the statutes, and therefore subject to the rights of the Crown under sections 123–126 of the Act of 1881.

It is, in my opinion, idle to contend that the use of the words "first charge upon the entire assets of the Company" in section 13 of the Act of 1884 creates a charge upon something which never was an asset of the Company—namely, the constructed part of the railway—as something not subject to the terms of the contract. All that the words "first charge" mean in that section is that the debenture-holders shall have a charge prior to the general body of the creditors of the Company; and it was, perhaps, desired to show in that section, what is specially enacted in the subsequent section 14, subsection (4), that all the debentures of the Company, whenever issued, were to rank alike.

It was contended that the provisions of sections 14, 16, and 17 of the Act of 1884 show that part of the railway may be sold, but I am unable to discern any such intention in the statute. Sections 14 and 16 refer to "such part of the Company's property as is liable under the provisions of this Act for the payment of such money," which may well refer to lands granted under the concession in

respect of the constructed portion of the railway, or to other assets of the Company. Section 17 is designed to meet the case of the purchase by the Crown, under sections 114–120 of the Act of 1881, of the railway after it had been fully constructed, and the possible event of moneys being outstanding upon debentures issued by the Company, and therefore charged by the statute upon the railway, but not then due. In such cases the Crown must have taken the railway subject to the charge, and it was to provide for this possibility that section 17 was enacted.

These considerations, apart from authority, in my opinion, effectually dispose of the contention of the debenture-holders.

The decided cases, however, lead to the same conclusion, for it is clearly recognised in Redfield *v.* The Corporation of Wickham (13 App. Cas. 467), and Grey *v.* The Manitoba and North-western Railway Company of Canada (1897, App. Cas. 254), that even where there is statutory authority for the mortgage of a railway, and for a sale by the mortgagees, a statutory railway undertaking cannot be disintegrated and sold by piecemeal sales at the instance of judgment creditors or encumbrancers. It is true that the last of these cases established that under certain Canadian legislation a section of a railway might be sold as a separate integer, but this was under legislation which expressly recognised the validity of such a sale. An attempt was made in the argument on the part of the debenture-holders in the present case to bring it within the principle of the Canadian case, because, as has already been observed, the line was, for certain purposes, divided into sections.

I have already said that in my opinion there is nothing in the Acts or in the contract to justify treating any one of these sections, or any number of them less than the whole, as a separate integer, and that it appears to me to be clear that the division of the line into sections was solely for the special purposes mentioned in the contract. An examination of the plans put in evidence gives irresistible proof that it could not have been the intention of the parties to the contract, or of the Legislature, that each section should be treated as a separate integer. In the seventy-five miles of railway constructed by the Company there are comprised some fourteen separate sections. To bring the case within the principle of Grey *v.* The Manitoba and North-western Railway Company of Canada, the contention of the debenture-holders must go the length of claiming that there is statutory authority for the sale of each of these sections separately, which appears to me to be absurd.

I am therefore of opinion that the case for the debenture-holders has entirely failed.

I think, therefore, that the motion on behalf of the Crown should be allowed, and that the order for sale should be varied by excluding the railway, and everything which comes within the meaning of that word, as defined by clause 2 of the Act of 1881, No. 37.

I agree that the summons on behalf of the Receiver should be dismissed, and that the Crown should have the costs of both applications, to be paid by the Receiver.

MIDLAND RAILWAY.

JUDGMENT of the COURT OF APPEAL (WILLIAMS, CONOLLY, and DENNISTON, J.J.) in the matter of the Petition of the Debenture-holders of the New Zealand Midland Railway. (Delivered in the Court of Appeal, at Wellington, 25th May, 1899.)

THE case for the petitioners is based upon the contention that their rights as debenture-holders, conferred upon them by sections 13 and 14 of "The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884," are prior to the rights vested in the Crown by section 123 of "The Railways Construction and Land Act, 1881," and that under the latter section the Crown has no rights against them. Unless they establish their contention their appeal must fail. The soundness or otherwise of the contention depends upon the true interpretation of the provisions of these Acts, and of the terms of the contract entered into between the Crown and the Midland Railway Company. The contract, as appears by its second clause, is for the construction of a line of railway from Springfield, in the Provincial District of Canterbury, to join a Government line of railway near Brunnerton, in the Provincial District of Westland, and thence from a point on the latter line of railway to Belgrove in the Provincial District of Nelson. The railway is to be completed within ten years from the 17th January, 1885. The contract itself contains no provision in the event of default being made in performance of the contract. The 123rd section of the Act of 1881, however, annexes a statutory term to the contract, and empowers the Governor, in the event of any unreasonable or inexcusable delay in the prosecution of the works connected with the railway, and in certain other events there specified, to take possession of the railway and, if he think fit, complete it, charging the Company with the outlay. The 125th and 126th sections give the Governor power of forfeiture if the Company fail to repay the sums expended by the Crown.

This is the weapon the law has placed in the hands of the Crown to compel the performance of the contract by the contractors, and to insure the completion of the work which the contractor has contracted for. It is on the face of it exceedingly improbable that the Legislature would compel the Crown to lay down this weapon in favour of persons claiming under the contractors. The object of the Act of 1884, and of the contract, was to secure the completion of a line of railway which, with the existing lines, would form a trunk line through the South Island from the Bluff to Nelson, and would have the effect of uniting by railway communication the West Coast and Nelson with the eastern coast of the Island. If the contention of the petitioners is sound, it would go far to frustrate the purposes for which the Act of 1884 was passed and the contract entered into. It would require, therefore, very plain language in the statute to show that the rights of the petitioners took precedence of the rights of the Crown. It was argued that the preamble of the Act of 1884 recited that it was desirable to give further facilities for the construction of this railway, and that this indicated that the Act was intended to give a higher security to persons who lent money than they would have had under the Act of 1881. The Act of 1884, however, affords a substantial additional facility for the construction of the line, in that by section 8, subsection (7), the value of the land to be granted to the Company is not to exceed 50 per cent. of the cost of the railway; whereas under section 106 of the Act of 1881 the value was not to exceed 30 per cent. To infer from the preamble any possible intention to postpone the right of the Crown in favour of debenture-holders would be altogether unjustifiable. The Act of 1881, in clauses 52 to 56 inclusive, contained provisions

authorising and regulating the borrowing of money by companies subject to that Act. These provisions were repealed by the Act of 1884, and the provisions authorising borrowing, and regulating the rights of the present debenture-holders, are contained in sections 9 to 17 of the latter Act. By section 18 of the Act of 1884 the borrowing sections of the Act of 1881 and a number of other sections were repealed, but that section goes on to say, "but otherwise the principal Act shall have full force and effect in respect of the railway to be constructed under the authority of this Act and the Company constructing the same, except as herein is specially provided in modification thereof." It was conceded that under the borrowing powers conferred by the Act of 1881 the rights of the Crown under section 123 would take precedence of those of the lenders of money. By section 18 of the Act of 1884 above set out, section 123 has full force and effect, except as in the Act of 1884 is specially provided in modification thereof. We have therefore to ascertain if there is a special provision in the Act of 1884 which deprives the Crown of the rights which it would otherwise have had under the Act of 1881. The Company, by section 9 of the Act of 1884, has power to borrow on debentures such sums of money as may be necessary for completing the construction of the railway. Section 13 is as follows: "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." The petitioners rely on the words "first charge," and insist that as the section contains these words the rights of the Crown are postponed to the rights of the debenture-holders. It seems to us that simply to state the proposition is to show its fallacy. The words "first charge" have the same meaning and the same force and effect whether the first charge is given by statute or by the charter of the company. A first charge is a charge which takes priority over all other charges. But the rights of the Crown, given by section 123 and the following sections of the Act of 1881, are in no sense a charge. These sections confer rights on the Crown as one of the parties to the contract, for the purpose of ensuring the completion of the contract, and there is certainly nothing in section 13 containing any special modification in favour of the debenture-holders of the rights of the Crown conferred by section 123 of the Act of 1881, prior to the issue of any debentures. If section 13 had been intended to override the rights of the Crown, it would have done so in express terms. The persons who lent money on debentures must be taken to have had notice of the contents of the statutes under which they obtained the security, and to have been aware that by section 18 of the Act of 1884 they took subject to the rights given to the Crown by the Act of 1881, unless by the Act of 1884 there was a special provision in modification of those rights. It seems to us hopeless to pretend that section 13 contains any such special provision. In our opinion, the remarks of the Privy Council in the Government of Newfoundland *v.* the Newfoundland Railway Company (13 A.C. 199) are exactly applicable to the present case. Their Lordships there say: "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 contemplated 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 they can justly claim, or that he is in any way to stand on higher ground than the borrower."

The facts of the case have been so fully gone into by the learned Judges in the Court below that there is no occasion for us to discuss them. We entirely concur in all the conclusions arrived at by those learned Judges (some of which, from the view taken by us, it has become unnecessary to consider), and in the reasons by which their conclusions were supported.

Appeal dismissed with costs.

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