THE CORPORATION OF THE CITY OF QUEBEC..... } APPELLANTS; 1884

AND

THE QUEBEC CENTRAL RAILWAY COMPANY..... } RESPONDENTS.

*March 14.
*June 23.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Railway Bonds—39 *Vic., ch.* 57 (*P. Q.*), *construction of*—*Condition Precedent*—*Certificate of Engineer, contents of*—*Parol evidence inadmissible*—*Onus probandi.*

The *L. and K. Ry. Co.* was incorporated in 1869 (32 *Vic.*, ch. 54), to construct a railway from *Levis* to the frontier of the state of *Maine*, a distance of 90 miles. The company was authorized by that act to issue bonds or debentures to provide funds for the construction of the railway.

In 1872, by 36 *Vic.*, ch. 45, power was given to issue bonds to the amount of three million dollars, without limitation of time, and without restriction as to the length of the railway constructed. In 1874, a statute of the Legislature of *Quebec* (37 *Vic.*, ch. 23), declared that debentures to the amount of $280,000 had already been issued, and limited for the future the issuing of bonds to the amount of £300,000 stg., to be issued as follows:—The first issue of £100,000 at once; the second issue of £100,000 when 45 miles of the road should have been completed and in running order, as certified by the Government Inspecting Engineer; and the third issue of £100,000 as soon as

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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30 additional miles—making in all 75 miles—should have been completed, with the same privilege for the three issues.

In 1875, by the Act 39 *Vic.*, ch. 57, the Legislature amended the former acts so as to modify the condition to be fulfilled by the *L and K. Ry. Co.* before the third issue of £100,000 could be by them made. This condition was as enacted by the said Act (39 *Vic*, ch. 57) "so soon as the rails and fastenings required "for the completion of the remaining forty-five miles or there- "abouts of the company's line shall have been provided, then "the remaining one thousand bonds, of one hundred pounds "each, to be termed the third issue, may be issued by the "company."

In that Act lastly cited, the preamble declared: "Whereas it "appears that a total length of forty-five miles of the company's "line having been completed, a first and second issue each of "one hundred thousand pounds of the company's debentures "have been made."

In March, 1881, the *L. and K. Ry.* was sold by the sheriff at the suit of the plaintiffs the *W. M. Co.*, and bought by the *Q. C. R. Co.* respondents for $195,000.

In April, 1881, the corporation of the city of *Quebec* (appellants), filed an opposition *afin de conserver* for $218,099, being the amount of 300 debentures of £100 sterling and interest of the second issue issued on the 25th January, 1875, numbered 1020 and upwards, payable on the 1st January, 1894, and for the payment oi which the opposants alleged that the said railroad was hypothecated.

The *Q. C. Ry. Co.*, also opposants in the case, contested the opposition of the corporation of the city of *Quebec*, and claimed the issue of the bonds of the second issue and held by the appellants was illegal. At the trial no certificate was produced, but the government engineer stated that he had reported to the Minister of Railways that there were only 43½ miles of the road completed, and the secretary of the company testified that the total length of railway certified by the government engineer as being complete and in running order had never exceeded 43½ miles. The learned judge at the trial found as a fact that there were only 43½ miles completed, and held the bonds of the second issue invalid. This judgment was affirmed by the Court of Queen's Bench (appeal side).

On appeal to the Supreme Court, it was

Held (reversing the judgment of the court below)—That the effect of the statute 39 *Vic.*, ch. 57 is to make the bonds

therein mentioned good, valid and binding upon the company, although the conditions precedent specified in 37 *Vic.*, ch. 23, might not have been fulfilled when they were issued.. (Ritchie, C. J., and Strong, J., dissenting.)

Per *Fournier* and *Henry*, JJ., that as there was evidence that a certificate or report had been given, oral evidence of the contents of the certificate or report was inadmissible and therefore respondents had failed to prove the illegality of the second issue.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side).

The facts and pleadings sufficiently appear in the head note, and judgments hereinafter given.

Mr. *P. A. Pelletier*, Q.C., for appellants:

The ground upon which the respondents contend that the appellants are not entitled to rank *pari passu* with them on the proceeds of the judicial sale of *Levis & Kennebec Railway* is that forty-five miles of the road had not been completed, a condition precedent, they alleged, necessary to legalize the issue of the bonds of which they are the holders. First, I submit that if the bonds mentioned in their opposition have been issued previous to the completion of the 45 miles of the road, and without the production of the certificate of the Government engineer, these bonds have nevertheless been declared valid and legally issued, by the Act 39 *Vic.*, ch. 57.

The legislative power which has imposed certain conditions on the *Levis & Kennebec Railway Company* on the issue of the bonds, had the right to alter, change, and even remove those conditions. The Legislature which, in 1874, had authorized the issuing of the bonds only after 45 miles would have been completed, had the right to declare, in 1875, that those bonds were valid, though issued before the completion of the 45 miles of the road.

Admitting that, conformably to the Act 39 *Vic.*, ch.

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57, the *Levis* and *Kennebec Railway Company* had purchased the rails and ties or fastenings for the remainder of the road to the frontier, and that the bonds of the third issue be legal would not the bonds of the second issue be legal? Certainly they would. And there is no proof of record that the rails and ties have not been purchased, and that the bonds of the third issue have not been issued. But if the bonds of the third issue have or had been issued regularly after the purchase of the rails and ties, how can it be pretended that the bonds of the second issue would nevertheless be null? Such a pretension would lead to a very illogic, abnormal consequence, to a consequence manifestly in contradiction with the intention of the Legislature.

If the appellants fail on this branch of the case, then I submit that the proof adduced by the respondents is not only insufficient, but it is also illegal. The certificate of the engineer not having been produced, it was not competent to prove the contents thereof by oral testimony.

Geo. Irvine, Q.C., for respondents:

No consideration of the equities of the case can affect the legal rights of the parties.

The learned judge who heard this case, came to the conclusion, as a matter of fact, that the length of the road at the time of the issue of these bonds mentioned in the statute was not completed.

The evidence of the secretary and of the engineer proves that fact beyond all doubt, and the condition precedent not having been fulfilled, the second issue of bonds is illegal.

Then, if it is admitted that the road was not completed, as it must be, I submit the insertion of the statement in the preamble of the Act 39 *Vic.*, ch. 57 (which

is a private Act) can have no effect. Any misrepresentations of fact or law in the preamble or body of a private Act can be shown. *Ballard* v. *Way* (1); *Shrewsbury* Peerage Case (2); *Hardcastle* on Statutes (3).

RITCHIE, C.J.:—

The *Levis and Kennebec Railway* was brought to sale by the Sheriff of the District of *Quebec*, at the suit of *The Wason Manufacturing Company*, the original plaintiffs in this case, and was adjudged to the *Quebec Central Railway Company* on the 22nd March, 1881, for the sum of $192,000. Upon this sale the *Quebec Central Railway Company*, the present respondents, fyled an opposition claiming $272.537.34, being the amount of several sterling bonds of the *Levis and Kennebec Railway Company* mentioned in the opposition. The corporation of *Quebec*, the present appellants, also fyled an opposition based upon a number of bonds alleged to be held by them, and for the amount of which they also claimed to be collocated upon the proceeds of the sale. The opposition of the corporation of *Quebec* was contested by the *Quebec Central Railway Company* on the ground that the bonds held by them were illegally issued, and consequently null and void, and this contestation was maintained by the judgment of the Superior Court, rendered on the 19th December, 1882.

The circumstances which have given rise to the present contestation may be shortly stated as follows:

The *Levis and Kennebec Railway Company* was incorporated by an Act of the Legislature of the Province of *Quebec* passed 32 *Vic.*, (1869) chap. 54, which Act was subsequently amended by the 36 *Vic.*, (1872) chap. 45, and again amended by the 37 *Vic.*, (1874) chap. 23, assented to 28th January, 1874, which is the only Act

(1) 1 M. & W. 529. (2) 7 H. L. C. 13.
(3) P. 242.

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necessary to be referred to for the purposes of the present case. The first section of this Act enacts as follows:

The following words in the twelfth, thirteenth, fourteenth and fifteenth lines, in the fourth section of 36 *Victoria*, chapter 45, to wit: "The said company shall have power to issue bonds to the amount of three million dollars, the capital of the said company, and such bonds shall not be for less than five hundred dollars each," are struck out, and the following are substituted therefor; "The said Company shall have power to issue debentures to the amount of three hundred thousand pounds sterling, and such debentures shall not be for less than one hundred pounds sterling each; provided, however, that until forty-five miles of the said company's railway shall be completed and in running order, as certified by the government inspecting engineer, no more than one thousand of the said debentures of hundred pounds sterling each, to be termed the first issue, shall be issued by the company; and as soon as such forty-five miles shall have been certified as complete and in running order as aforesaid, then a further issue of one thousand bonds of one hundred pounds sterling each, to be termed the second issue, may be made by the company, and no more of such bonds shall be issued by the company until seventy-five miles of the said road (inclusive of the aforesaid forty-five miles) shall be complete and in running order, as certified by the government inspecting engineer; and so soon as such seventy-five miles shall have been certified as completed and in running order as aforesaid, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company, it being understood, however, and hereby declared, that such terms 'first issue,' 'second issue' and 'third issue' shall be for convenience only of this bill, and shall not be deemed to give any of the said issues priority one over another."

This act was again amended by the 39 *Vic.*, (1875) chap. 57, assented to the 24th December, 1875, the preamble of which recites as follows:

Whereas the *Levis and Kennebec Railway Company* have prayed, that the act to amend their act of incorporation be amended in the particulars hereinafter set forth, and it is expedient to grant their prayer; and whereas it appears that a total length of forty-five miles of the company's line having been completed, a first and second issue, each of one hundred thousand pounds of the company's debentures, have been made, each of such issues consisting of one thousand debentures of one hundred pounds sterling each; and

whereas, since the passing of the said amended act, the subsidy by the Provincial Legislature has been increased to four thousand dollars per mile, and that further subsidies are about to be granted by various municipalities through which the line passes, thus providing a considerable portion of the amount required for the completion of the earth works and bridges on the forty-five miles of lines remaining to be completed; and whereas, to insure the speedy completion of the said forty-five miles now incomplete, it is expedient that the rails and fastenings required should be provided without delay.

Immediately on the passing of the act of 1874, the company issued £100,000 of bonds, as they had a right to do under the provisions of the said act. The bonds claimed by the respondents form part of this issue, which consist of one thousand bonds of one hundred pounds sterling each. The claim of the corporation of the city of *Quebec*, is founded upon bonds of the second issue.

These debentures of the second issue are headed, "*The Levis and Kennebec Railway*," province of *Quebec*, Dominion of *Canada*, incorporated by a special act of the Legislature of the province of *Quebec*, assented to on the fifth day of April, 1869, amended by an act assented to the 24th day of December, 1872, and further amended by an act assented to the 28th day of January, 1874," and on their face purport to be issued under the authority of the above-mentioned acts and of the *Quebec* Railway Act, 1869, and were issued the 25th January, 1875, 11 months before the passing of the 39 *Vic.*, cap. 57.

The contestation by the *Quebec Central Railway Company* alleges that inasmuch as the *Levis* and *Kennebec Railway Company* was only authorized to make the second issue of bonds when forty-five (45) miles of their road was completed and in running order as certified by the government inspecting engineer, and that as no such length of railway had ever been built by them,

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or ever certified by the engineer, this second issue was illegal, null and void. The evidence clearly shows that only forty-three and a-half (43½) miles of road had been completed up to the date of the sale by the Sheriff in 1881, and the government engineer states that he never gave any certificate for that length of line. The appellants, the corporation of the city of *Quebec*, contend on the other hand, that although it may be true as a matter of fact that the proper length of road had not been completed, the preamble of the Act of 1875 justifies them in claiming the legality of the bonds held by them.

I think we have nothing whatever to do in this case with the sale by the sheriff, but only with the proceeds of that sale. Both parties admit the sale to have been right, and no question is raised as to whether the sheriff sold too much or too little, nor as to what the purchasers were entitled to, or what their rights are under such sale. As to these questions all parties appear to be perfectly satisfied and to agree that if both these issues of debentures are legal the proceeds should be divided among the holders of such debentures in rateable proportion, but if the second issue are illegal, then the whole should be paid to the holders of the first issue. This is not a controversy between the holders of the second issue and the company that issued them, but between the holders of the first and second issues, and it is quite clear that the company and the holders of the second issue could not by any combination of theirs cut down the security of the holders of the first issue unless what they did had legislative sanction.

It is not, therefore, necessary to discuss or decide whether, if the money raised on these debentures has been *bonâ fide* applied for the purposes of the company, the *bonâ fide* lender is or is not entitled to payment as against the company; nor is it a question between the holders

of these debentures and the directors who issued them, nor between the shareholders and the directors or company. The sole controversy is whether the second issue of debentures are valid as debentures and entitled as such to rank *pari passu* on the money in court with those of the unquestionably legal first issue; in short, between the holders of the bonds legally issued and the holders of the bonds alleged to have been illegally issued, and the determination of this question will, in my opinion, depend entirely and solely on the question: whether since the issue of the second debentures they have been legalized directly, or there has been such a legislative recognition of their legality as to place them on an equal footing with the first issue.

As to the illegality of the second issue at the time the issue was made, I do not think there is room for any doubt.

It is hardly possible to conceive that the legislature could have used more clear and explicit language, not only limiting the right to issue debentures, but actually prohibiting the issue of debentures except as provided. Power is given to issue debentures to the amount of £300,000 stg., and such debentures shall not be for less than £100 stg. Provided, however, that until 45 miles of the said company's railway shall be complete and in running order, as certified by the government inspecting engineer, no more than one thousand of the said debentures of £100 stg. each, to be termed "the first issue," shall be issued by the said company. Could stronger prohibitory words have been used? They are negative and prohibitory, yet as if to remove the possibility of a doubt as to the intention of the legislature, that the company should have no right to issue debentures beyond such first issue till the 45 miles shall not only have been complete, but shall have been certified as complete and in running order, the legislation con-

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tains the enactment: "And as soon as such 45 miles have been certified as complete and in running order as aforesaid, then a further issue of one thousand bonds of £100 stg. each, to be termed 'the second issue" may be made by the company."

Is there anything ambiguous here—is there any room for doubt or argument? Could a condition precedent to the right to issue more bonds be more clearly or explicitly stated? And this it must be remembered is an act passed to amend a previous act which contained these words: "The said company shall have power to "issue bonds to the amount of $3,000,000, the capital "of the said company, and such bonds shall not be for "less than $500 each," by directing these words to be struck out and substituting those I have referred to, limiting and prohibiting the issuing of debentures, except as provided for in the manner I have pointed out.

After the passing of this act the company issued, as they had a right to do, 1,000 debentures of £100 stg. each, which became for the time being a first charge on the road. But in the face of these statutory provisions referred to, not only without authority of law, but in direct defiance of the legislature, when 45 miles of the road were not complete and in running order and were not so certified by the government inspecting engineer, —for it is not questioned, and under the evidence cannot be questioned, that 45 miles were not complete and in running order, and such 45 miles were not certified as being complete and in running order by the government engineer—the second bonds were issued; that is to say, the company on the 25th January, 1875, issued 300 debentures of £100 stg., those now held by the city of *Quebec*. If the conditions of a statutable power are not complied with, how can it be said to be lawfully exercised? Can any person, lawyer or layman, who

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can read and understand the English language, say otherwise than that the debentures so issued were issued not, only without authority of law, but in direct opposition to a clear and express enactment of the legislature, and therefore illegally issued and consequently void, and no more in fact and in law than waste paper.

I have therefore no difficulty in coming to the conclusion, forty-five miles of the road not having been completed, that the company in issuing the second bonds pledged their funds, not only in an unauthorized but in a forbidden manner, in a manner beyond their powers at the time the issue was made, and for which they had not obtained parliamentary authority; even if the issue was made in the expectation of such authority being obtained, the bonds were improvidently and illegally issued without reference to the necessity of 45 miles of the road being first completed.

It seems almost a waste of time to refer to authorities on a matter which seems so clear as that the second bonds were illegal when issued.

Re Pooley Hall Colliery Company (1):

By the articles of association of a company, extended by a special resolution, the directors were empowered to incur debts and to borrow on mortgage and other securities to an amount not exceeding £8,000. They issued a number of debentures at a time when the liabilities of the company exceeded £8,000; and it was held, that the debentures were not voidable, but absolutely void, and that the holders of them could only come in *pari passu* with the simple contract creditors for the amounts secured by their debentures.

Lord *Romilly* in that case said:

With respect to the debenture holders, I think the validity of the debentures depends upon the fact of whether the liabilities did or did not exceed £8,000, at the date of the issue. That was the amount which was fixed as the limit.

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(1) 21 L. T. N. S. 690.

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Therefore I am of opinion that if the liabilities of the company exceeded £8,000, they had no power to issue these debentures; that they are not voidable, but that they were absolutely void, the directors having had no authority to issue them.

In *Wales* v. *Ropert* (1), in which case the debentures were declared void as being for a sum in excess of the borrowing powers of the company, *Keating*, J., says:

So far as binding the company is concerned that document was mere waste paper. The directors had no power to issue it, and it was afterwards held by the Court of Chancery to be absolutely and *ab initio* void.

In reference to a railway company whose borrowing powers were not to arise until a certain portion of their line was open for traffic, in speaking of debentures issued in contravention of such statutory powers as being invalid, *In re Bagnalstown and Wexford Railway Co.* (2), the Lord Justice of appeal says:—

The former is limited by the number and values of the shares; the latter (their loan capital) undergoes a two-fold limitation, viz: first, a restriction of the total that may be borrowed; second, the imposition of conditions precedent, such as, in some companies, that the whole share capital be subscribed for and one-half of it actually paid up; in others, that the undertaking shall have begun to be productive, by the opening of the line or of described portions of it. Any attempt to add to the loan capital in violation of either of those restrictions—*i.e.*, either after the full amount permitted has been already borrowed, or before the prescribed conditions precedent have been fulfilled—would be illegal, and the debentures so issued would be invalid.

In re The Cork and Youghal Railway Co., exparte, Overend, Gurney & Co. (limited) (3):

The railway company had exhausted their capital and borrowing powers; but their undertaking was yet incomplete. At a general meeting of the company, a balance sheet, showing the then amount of excess, was laid before the company, and a resolution was adopted authorizing the board to issue to *L.*, their financial agent, bonds to

(1) L. R. 8 C. P. 477. (2) Ir. L. R. 4 Eq. 526.
(3) 21 L. T. N.S. 738.

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be settled by counsel. *Lloyd's* bonds to a large amount were accordingly given to *L.*, upon which he raised money, some part of which, it was not disputed, was applied in payment of the company's debts and completing their works, and the bonds passed from *L.* into the hands of the present respondents, who carried in claims against the proceeds of sale of the railway under a special Act of parliament for its dissolution, and claimed to be entitled to a surplus of such proceeds in priority to the shareholders. On appeal by the shareholders, it was held that, although it was not law that no creditor who trusted the company after its capital and borrowing powers were exhausted could recover what was due to him, yet any debenture, loan notes, or the like, for the mere borrowing of money in excess of the company's powers, were void; but as the moneys raised in this case had been applied in paying debts of the company, and otherwise for the purposes of its undertaking, with the sanction and acquiescence of its shareholders, these latter could not be entitled to the surplus of the company's property without repaying all moneys so raised and expended.

The Lord Chancellor said:

On the other hand it was equally clear, or it has been made clear, if it was not clear before by the case of *Chambers* v. *The Manchester & Milford Railway Co.*, and the very able and lucid judgment there given, especially that of Mr. Justice *Blackburn*, that any scheme by which a company is authorized only to raise a given amount of capital by shares, and then a certain other quantity, usually one-third, of the share capital is prescribed by the Act of parliament under which it acts, in the shape of debentures or mortgages, they cannot issue any debenture, or loan note, or any security of that description, for the mere purpose of borrowing money; and I apprehend any such instrument so issued would be just as void in equity as at law, being contrary altogether to statute, and being absolutely forbidden by statute; for I entirely adopt the view which was taken by the learned judges, that that thing, in respect of which a penalty is inflicted by statute, must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever.

That being so, this distinction is drawn by Mr. Justice *Blackburn*, which appears to me to be very plain and clear. He says (l):

They (that means these instruments) are on their face the acknowledgment of a debt to some particular person, with a covenant to pay it. Such instruments may be useful in this way: when a company are indebted it may be convenient to make a bond

(l) 5 B. & S. p. 611.

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pointing to a particular portion of the debt actually due; it would facilitate the assignment in equity of the debt thus acknowledged to be due, and possibly throw upon the company the onus of showing the non-existence of the debt. But if there be no debt existing, such an instrument cannot create one, nor put any assignee in a better position than the original obligee or covenantee; and the person holding it could not recover upon it, if it was shown that it was given gratuitously, or was not authorized by statute."

Lord Justice *Giffard* said:—

I think it of importance to state clearly in this case that it is not intended by the court to throw the slightest doubt on the decision come to in the case of *Chambers* v. *The Manchester amd Milford Railway Co.*, and, from the course which the matter took in the court below, I think it also important to say that there is no ground whatever for the argument that a contract or instrument which fails in a court of law by reason of its illegality can, nevertheless, be enforced in equity, bacause money has been paid and received in respect of it. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks, but as to any claim sought to be actively enforced, the defence of illegality is as available in a court of equity as it is in a court of law; and it is for that reason, among others, that the declaration made by the court below has been varied. That, of course, is no answer to the present case.

But it is now contended that a new Act was passed by which the validity of these bonds is established, the practical effect of which would be that from the date of their issue, 25th January, 1875, up to the passage of this Act on the 24th December, 1875, the rights of the holders of the first issue, continued as a first and only charge, in no way affected by this illegal issue, but were by the passing of this Act swept away and the holders of the illegal issue placed on the same footing as the holders of the first issue legally made, and entitled to rate concurrently, as no doubt they would have been entitled to do, if such second issue had been legally made.

If the legislature contemplated legislation of this exceptional and retrospective character, we shall require

to find such an intention clearly and unequivocally expressed. The Act relied on is the 39 *Vic.* ch. 57, which was passed, as appears by the preamble above cited, at the instance and on the prayer of the *Levis & Kennebec Railway Co.*, and which enacts as follows,

The following words in the 22, 23, 24, 25, 26, 27, 28, 29 and 30th lines of the first section of 37 *Vic.*, ch. 23, to wit:

And no more of such bonds shall be issued by the company until seventy-five miles of the said road (inclusive of the aforesaid forty-five miles) shall be complete and in running order as certified by the government inspecting engineer, and so soon as such said seventy-five miles shall have been certified as completed and in running order as aforesaid, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company are struck out and the following are substituted therefor:

And as soon as the rails and fastenings required for the completion of the remaining forty-five miles or thereabouts of the company's line shall have been provided, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company.

The act 39 *Vic.*, ch. 57 will bear no such construction as contended for. The recital cannot be relied on either as establishing the truth of the statements contained in the recital, or as repealing the provisions of the original act, or as legalizing these debentures. There is nothing in this act repealing the first act either by express words or by necessary implication. To give this act such a retrospective operation, as is now sought to be done, is opposed in my opinion to all principle and authority.

There is not a word in this act in express terms, that I can discover, affirming the legality of this issue, still less recognising such illegality and legalizing it, nor is there any language altering the law, or indicating any intention to alter the law by repealing the 37 *Vic.*, ch. 23, which prohibited the second issue until forty-five miles were completed and certified to. The legislature had no such object in view, nor were they, as appears

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by the recital, asked to do so; the legislation sought was not to aid the holders of the second issue, still less to take away, or to lessen, impair, or affect in any way, the rights of the bondholders under the first issue, (and it was not in reference to either of these issues of stock) but to enable the company to provide rails and fastenings for the speedy completion of the length of road represented by the company to be incomplete, and surely this legislation must be construed consistently with and not in derogation of the rights of other parties as they stood at the time.

There is not the slightest indication from the language of the act of an intention to cut down the express provisions of the previous enactment, or to modify, alter, or excuse, the fulfilment of the conditions to be fulfilled by the *Levis and Kennebec Railway Company* before issuing the second debentures. On the contrary, the provisions of the act assume the fulfilment of the conditions and the legality of the issue. Any recognition of the validity of the debentures by the legislature is based only on the representation placed before the legislature by the *Levis and Kennebec Railway Company*, that the conditions had been complied with; and this we are now asked to construe into a recognition that the bonds had been legally issued, whereas the whole representation was to the effect that the conditions having been complied with no legislative recognition was needed to give them legal force and effect.

Clearly what the legislature intended to do was, at the instance of the company, to base certain legislation, as to the issue of further debentures, on the representation that certain bonds already issued had been legally issued, not to deal with or to recognize and give vitality to an issue illegally made. Had the company represented to the legislature that the condition imposed by the 37 *Vic.*, ch. 23, had been

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disregarded and the 45 miles never completed or certified as provided, and an issue had been made in defiance of the law and was consequently illegal, can it be supposed the legislature would have legalized such an issue to the detriment of the holders of the first legal issue? If the legislature determined to do so, is it possible to suppose an intention would not be apparent on the face of the act and manifested in terms express, clear and unmistakable? And here the language of *Jessel*, M.R., in *Harrison* v. *Cornwall Minerals Railway Co.*, (1) is strictly applicable, viz:—

> On the other hand the argument appears to me to be without answer, that the vested rights of persons acquired before the passing of the Act, who either bought debenture stock or lent money on mortgage, are not interfered with by the legislature without compensation, and it requires the strongest and clearest words in an Act of parliament before you are entitled so to interpret it as to deprive people of their property without compensation.
> * * * * * *

It being shown, as it has most unquestionably been in this case, the representation of facts essential to the legality and validity of the issue was incorrect, though the legislature may have acted on such a misrepresentation and the legislation based on such misrepresentation be fruitless, the illegality of this issue remains as if the legislature had not been mislead.

But even if the insertion of a statement in an Act such as this would amount to a legislative recognition, so soon as the allegation is shown to be incorrect the recognition necessarily ceases to have any effect. It being made to appear that the representation was unfounded, and the fact not being as the legislature on such representation assumed it to be, the recognition relied on necessarily falls with the representation and the assumption based thereon. This was a private act prayed for by the company, and any misrepresentation

(1) 18 Ch. D. 341.

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of fact or law in the preamble or body of the act can be shown. As regards the character and the true construction of this act and the effect of the recital, the following authorities are applicable:

Quilter v. *Mapleson* (1):

It is a well settled rule that you are not to construe an act to be retrospective so as to alter existing rights, unless you find from the act itself that such was the intention of the legislature.

As a general principle acts of parliament, especially when they alter the rights of parties, are not to be construed retrospectively unless otherwise provided.

Hickson v. *Darlow* (2). Mr. Justice *Fry* in that case says:

Now, it is a well-known principle of law on the construction of acts of parliament, and especially when the rights and liabilities of persons are altered thereby, that they are not to have a retrospective operation unless it is expressly so stated.

And *Jessel*, M. R., in *Quilter* v. *Mapleson* (3):

The question whether an Act of parliament is retrospective in its operation must be determined by the provision of the Act itself, bearing in mind that a statute is not to be construed retrospectively unless it is clear that such was the intention of the legislature.

There can be no question, in my opinion, that this is a private act to which the holders of the first issue were no parties, and I think it a clear principle that rights acquired under the 37 *Vic.*, ch. 23, cannot be taken from them by a private act to which they are not parties, unless by clear express words the intention is manifest.

In *Ballard* v. *Way* (4), Lord *Abinger*, C.B., says:

I consider that these Acts of parliament (private acts) do not affect all mankind with a knowledge of what is contained in them.

And in *Earl of Shrewsbury* v. *Scott* (5), *Cockburn*, C.J., says:—

(1) 9 Q. B. D. 672.
(2) 23 Ch. D. 692.
(3) 9 Q. B. D. 674.
(4) 1 M. & W. 529.
(5) 6 C. B. N. S. 157.

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We have been reminded, indeed, that a private act of parliament has been said upon very high authority to be little more, if anything, than a private conveyance between those who are parties to it, and to a certain extent I agree to that proposition. Recitals in a private act of parliament could never be held to bind persons who were not parties to the act. Provisions, however general in their terms, could not be held to affect the rights of parties who were not before parliament and whose rights were never intended to be affected.

In *Mahony* v. *Wright* (1), *Lefroy*, C. J., says:—

But it is settled by authority that the recital of an intention merely in a subsequent statute to repeal a former specific statute will not operate by implication to repeal the former statute, and that in order to affect such a repeal there must be a clause of repeal in the repealing statute.

Per L. J. *Turner* in Trustees of *Birkenhead Docks* v. *Laird, &c.* (2):

It is thus laid down in *Jenkins*, 3rd century, case 11:

"A special statute does not derogate from a special statute without express words of abrogation."

Per Kay, J. in *Gard* v. *Commissioners of Sewers* (3):

General enactment cannot repeal specific enactment in an earlier act merely by implication.

In *Edinburgh & G. Ry. Co.* v. *Magistrates of Linlithgow* (4), the Lord Chancellor says:

A recital in an Act will not bind those who are not within its enacting part.

In *Purnell* v. *Wolverhampton N. W. Co.* (5), *Erle*, C. J., says:

There is much in the argument of Mr. *Powell*, that these are all in the nature of private acts, and that a provision in a private act is not to be held repealed by a subsequent private act, unless there are words which operate expressly to repeal it, and I think the principle thus enunciated by him should guide our judgment upon this occasion.

Byles, J.:

(1) 10 Ir. C. L. 426.
(2) 4 DeG. McN. & G. 742.
(3) 49 L. T. N. S. 328.
(4) 3 Mac. H. L. C. 708.
(5) 10 C. B. N. S. 576.

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I am of the same opinion, and I must confess I have been much influenced by the case of the *Trustees of the Birkenhead Docks* v. *Laird* (1), where Lord Justice *Turner*, a very high authority, lays down the rule to be this: "It is a rule of law that one private act of parliament cannot repeal another, except by express enactment." If the Waterworks Clauses Act, 1847, were so incorporated with the *Wolverhampton* Waterworks Transfer Act, 1856, as to override the 18 and 19 *Vic.* ch. cli., it could only at the utmost impliedly repeal the 40th section of the last mentioned Act; and the case referred to is a distinct authority to show that there can be no repeal except by express enactment.

As to what are private acts. The marginal note in *Brett* v. *Beales* (2) is as follows:

An act of parliament, private in its nature, is not made admissible in evidence against strangers by a clause declaring "that it shall be deemed and taken to be a public act and shall be judicially taken notice of without being specially pleaded." A canal act is not rendered a public act by containing provisions empowering the company to regulate and take towage rates and tolls from persons using the canal.

Per Atty.-Gen. *arguendo:*

These private acts have always been treated as mere contracts between individuals and their recitals are of no more value than the recitals of any private deeds.

Lord *Tenterden*, after consulting his brother judges on two grounds laid for admission of evidence—1st, that the concluding clause renders it admissible as a public act; 2nd, that independent of that clause it is so from its nature, says (3):—

The answer given to the first was that the clause only applied to the forms of pleading and did not vary the general nature and operation of the act. I was inclined to that opinion at the time and my learned brothers agree with me in that impression. We also think that the second ground fails. It is said that the bill gives a power of levying a toll on all the king's subjects, and therefore the act is public. The power given is not so extensive, it is only to levy toll on such as shall think fit to use the navigation. The ground, therefore, on which it is said the act is public and the evidence admissible fails and I cannot receive it.

(1) 23 L. J. Ch. 457. (2) 1 Moody & M. 421.
(3) 1 Moody & M. 425.

In *Beaumont* v. *Mountain* (1), on *Brett* v. *Beales* (2) being cited and commented on, *Alderson*, J., says:—

The question in that case was not so much as to the mode of proving the act as to whether the act could be taken as proof of certain facts recited in it.

The court held when the act is declared to be a public act and is required to be judicially taken notice of without being specially pleaded, it was unnecessary to prove it by certified copy of the original.

And in *Wordward* v. *Cotton*, (3) *Alderson* B.:—

I think Lord *Tenterden* only meant to say in *Brett* v. *Beales*, that the clause was one respecting the mode of proving the act, and that for other purposes, as for instance the recital of matters in it, it did not give it the effect of a public act.

And Lord *Lyndhurst*, C.B., says:—

The case of *Brett* v. *Beales* has been much misconceived. It is certainly not well reported, but I think that upon the whole scope of it Lord *Tenterden* meant to rule the same law that is decided in *Beaumont* v. *Mountain*.

As to the effect of recitals with reference to questions of fact or of law.

In *The Queen* v. *The Inhabitants of Haughton*, (4).

By a local and personal act (since repealed) it was recited that the highway in question was in the township of D. *Held*, recital not conclusive.

Lord *Campbell*, C.J., says:—

Had there been anything amounting to an enactment that the road should be considered in *Denton*, this would have prevailed over the estoppel, but a mere recital in an act of parliament, either of fact or law, is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital.

In the *Shrewsbury* Peerage case (5) it is said:—

The act 1 *Geo. IV.*, c. 40, was put in for the purpose of reading a part of the recital.

(1) 10 Bing. 405.
(2) 1 Moody & M. 421.
(3) 1 C. M. & R. 47.
(4) 1 El. & B. 501.
(5) 7 H. L. C. 13.

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An act 6 and 7 *Vic.*, c. 28, and other private acts, were then proposed to be put in for a similar purpose.

Mr. Serjeant *Byles* objected to receiving these recitals as evidence of the facts.

Sir *F. Kelly* contended that they were complete evidence of such facts; the *Wharton* Peerage, where the Lord Chancellor, on such evidence being tendered, said "It is very strong proof, for it is the well known practice of this House not to allow the insertion of such a statement in the recitals of a private act of parliament, unless the truth of that statement has been previously proved to the satisfaction of the judges to whom the bill has been referred."

Lord *St. Leonard's:*

That used to be the practice, but it is not so now, the evidence in support of private bills is not now submitted to and reported on by the judges, and future recitals will not therefore be evidence.

With the hardship of this case we have nothing to do; if the second issue is legal, the holders are entitled to their share of the money in court, if they are not legal they have no claim and no court can relieve them. But I cannot help remarking that I should think no prudent person would take debentures without looking at the authority of the company to issue them. On this point *Jessel*, M.R., says in *Harrison* v. *Cornwall* (1):

No companies borrow under their statutory powers, or ought to borrow, without expressing all the acts under which they borrow, and I believe they do. It is the practice to state under what acts they borrow the money, so that the lenders may look at the acts for themselves, and see what the powers are. Any lender would, no doubt, be very foolish who did not inquire of the company as to what their borrowing powers were, and I have known such questions addressed to secretaries of companies over and over again.

The most casual glance at the statute would show the absolute conditions under which alone the power of issuing debentures in this case could be exercised, and the prohibition from issuing except on those conditions, and if seeing this a purchaser did not choose to inquire whether the conditions had been complied with or not, I cannot see that he has anybody but himself to blame.

(1) 18 Ch. Div. 341.

It is impossible that at the time the company issued and parted with these debentures, any person could have been misled by the recital in the act, for it is clear beyond all doubt that they were issued before the passing of the act; the act says so, and the appellants in their opposition admit it as follows :

OPPOSITION AFIN DE CONSERVER PRODUITE PAR L'APPELANTE LE 5 AVRIL 1881.

Que le vingt-cinq de janvier mil huit cent soixante-quinze, la dite défenderesse, en conformité à la loi, a émis et mis en circulation trois cent bons ou débentures, de la somme de cent louis sterling chaque, par lesquelles débentures elle s'est obligée de payer au porteur de chacune des dites débentures, le premier de janvier mil huit cent quatre-vingt-quatorze, la dite somme de cent louis sterling, pour valeur reçue, avec intérêt à raison de sept louis sterling par chaque somme de cent louis sterling, le dit intérêt payable les premiers jours de janvier et de juillet de chaque année, depuis la date de l'émission des dites débentures jusqu'au dit premier de janvier mil huit cent quatre-vingt-quatorze, au porteur des coupons ou bons annexés aux dites débentures et en faisant partie;

Que les dites trois cents débentures ainsi émises par la dite Défendresse, &c., &c.

But if any person could have been misled, the hardship would be infinitely greater on the holders of the legal first issue if their security was to be cut down behind their backs by debentures issued on a date when there was no law to justify their issue, and for which issue no subsequent legislative authority has been given, simply because the company introduced a misrepresentation into the private act, on the assumption of the correctness of which the legislature made provision, not for legalizing any unlawful issue, but simply assuming to have been correctly done what was so alleged, with reference to other operations for finishing the road, with which neither the holders of the first issue nor of the second issue had anything to do.

STRONG, J., concurred.

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FOURNIER, J :—

Les deux parties en cette cause, l'appelante et l'intimé, sont porteurs de bons émis par la compagnie du chemin du fer de *Lévis* et *Kennebec*, en vertu de l'acte 37 *Vic.*, ch. 23 des statuts de *Québec*, amendant la charte du dit chemin de fer de *Lévis* et *Kennebec*. Ce statut constate que lors de sa passation, des bons avaient déjà été émis au montant de $280,000, et limite pour l'avenir l'émission de bons à la somme de £300,000 sterling,—qui seraient émis comme suit : une première émission de £100,000 devant avoir lieu immédiatement ; la seconde (100,000) £100,000 lorsque 45 milles du chemin en question auraient été complétés, et la troisième aussi de £100,000, lorsque trente autres milles du dit chemin de fer auraient été construits. Ces différentes émissions quoique appelées 1ere, 2me et 3me, n'ont aucune priorité les unes sur les autres,—au contraire, elles doivent affecter le dit chemin de fer au même degré, ainsi que le statut le déclare :

It being understood, however, and hereby declared, that such terms "first issue," "second issue" and "third issue" shall be for convenience only of this bill, and shall not be deemed to give any of the said issues priority one over another.

Cet acte fut plus tard amendé et la condition de construire trente milles de chemin de fer avant de pouvoir faire la 3me émission fut abolie par la 39me *Vic.*, ch. 57, et remplacée par la suivante :

So soon as the rails and fastenings required for the completion of the remaining 45 miles or thereabouts of the company's line shall have been provided, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company.

Le chemin de fer de *Lévis et Kennebec*, hypothéqué à la garantie de ces bons a été vendu par le shérif du district de *Québec*, le 22 mars 1884, pour la somme de $192,000. C'est l'intimé qui en est devenu l'acquéreur.

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Comme porteur de bons de la 1re émission, il a formé opposition sur le produit de la vente pour la somme de $284,537.34.

L'appelante aussi produit une opposition réclamant, sur les mêmes deniers, le paiement de $218,099 pour bons de la 2me émission, avec rang de première hypothèque sur le dit chemin

L'intimé à contesté l'opposition de l'appelante sur le principe que les bons dont elle était porteur faisaient partie de la seconde émission qui avait été faite illégalement. L'intimé base cette prétention sur cette partie de la 37me *Vict.*, ch. 23, en déclarant que la 2me émission n'aura lieu qu'après que 45 milles du dit chemin de *Lévis* et *Kennebec* auront été complétés, et il allègue que de fait la dite émission a eu lieu lorsqu'il n'y avait encore que 43½ milles du chemin fait et terminés, et qu'en conséquence la compagnie du chemin de *Lévis* et *Kennebec* n'a jamais eu le droit de faire que la première émission et que tous les autres bons émis par elle sont nuls.

L'appelante a attaqué en droit cette défense, en alléguant que le fait avancé par l'intimé que les 45 milles de chemin de fer n'avaient jamais été complétés, était contraire à la loi 39 *Vict.*, ch. 57, laquelle déclare dans son préambule que les dits 45 milles du chemin de fer ont été complétés, et reconnaît dans ses dispositions la validité de la seconde émission et modifie les conditions pour la troisième émission. Avant de faire droit sur cette défense il a été ordonné de procéder à la preuve sur les faits avancés par l'intimé. Celui-ci après avoir exposé les faits dans son *factum*, dit que cette cause ne présente qu'une seule question, celle de savoir quel doit être, à l'égard de personnes non parties à un acte privé, l'effet de la constatation dans le préambule de l'acte d'un fait qui est en réalité erronné. Il pose ainsi la question :—

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From this statement it will appear that the whole point in this case is whether the recital contained in the preamble of a private act of a fact itself untrue and erroneously stated, is evidence of the truth of such fact against persons who are in no way parties to the passing of such private bill, and who were in all probability ignorant of what was taking place.

C'est aussi à cette seule question que l'hon. juge qui a décidé en première instance a réduit les divers points de fait et de droit soulevés par l'appelante. Cette manière de voir ne représente pas correctement ses prétentions. Elle n'a pas prétendu s'appuyer seulement sur l'énonciation contenue dans le préambule de la 39 *Vic.*, ch. 57. Mais elle invoque pour justifier sa prétention l'effet de cet acte sur l'ensemble de la législation concernant ce chemin de fer. Elle prétend de plus que l'intimé ne pouvait pas par une preuve testimoniale contredire les déclarations contenues dans la 37me *Vic.*, ch. 57.

L'hon. juge après avoir cité une partie du préambule, se demande s'il fait partie de l'acte et s'il a aucune force législative. Il cite l'autorité de *Dwarris* sur l'effet du préambule dans un statut. Il cite aussi l'autorité de *Taylor* (1), pour montrer qu'une énonciation même dans un acte public ne forme pas une preuve concluante, et il en tire la conclusion suivante :

The preamble of the act in question being without force in a legislative sense, and creating or conferring no powers, the pretention of the corporation, &c., &c..... is unfounded in law.....

Comme on le voit par les expressions de l'hon. juge lui-même, il a limité son examen de la qnestion à l'effet du préambule.

Aucune observation de sa part ne fait voir s'il a cherché dans le corps de l'acte la confirmation de l'énonciation du préambule, ou s'il ne se trouve pas dans le corps de l'acte quelque déclaration équivalente à une disposition législative formelle reconnaissant la validité des bons de la 2me émission.

(1) On Evid., p. 1423.

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Il faut d'abord remarquer que ce préambule est d'un caractère tout spécial; la mention de l'achèvement des 45 milles du chemin de fer, est le moindre fait qu'il contient. On y trouve de plus des déclarations qui font voir que cet acte a été le résultat d'une transaction entre le gouvernement et les intéressés, en considération de l'augmentation du subside accordé par la législature et en vue de nouveaux subsides sur le point d'être accordé. On ne pourrait donc pas retrancher une seule des conditions de ce compromis sans détruire complètement l'effet de cette loi. Il est nécessaire, je crois, de citer les principales parties de ce préambule :—

Attendu qu'il appert que lorsqu'une longueur totale de quarante-cinq milles de la compagnie a été complétée, une première et une seconde émission des débentures de la compagnie ont eu lieu chacune pour un montant de cent mille livres, chacune des dites émissions consistant en mille débentures de cent livres sterling chacune; et attendu que depuis la passation du dit acte amendé, le subside accordé par la législature provinciale a été élevé jusq'à concurrence de quatre mille piastres par mille, et que de nouveaux subsides sont sur le point d'être accordés par les diverses municipalités traversées par la dite ligne, contribuant ainsi dans une proportion considérable au montant requis pour l'achèvement des terrassements et des ponts sur les quarante-cinq milles qui restent à compléter; et attendu que pour obtenir le prompt achèvement des dits 45 milles actuellement inachevés, il est à propos que les rails et les attaches requis soient achetés sans délai.....

Ce préambule qui contient tant de faits précis et importants doit sans doute avoir un effet considérable sur l'interprétation de l'acte, et suivant l'article 12 du C. C. de *Québec*, il doit être considéré comme faisant partie de l'acte.

Lorsqu'une loi, (dit cet article,) présente du doute ou de l'ambiguité, elle doit être interprétée de manière à leur faire remplir l'intention du législateur et atteindre l'objet pour lequel elle a été passée.

Le préambule qui fait partie de l'acte sert à l'expliquer.

Il faut remarquer que ce statut est un de plusieurs actes amendant la charte du chemin de fer de *Lévis* et *Kennebec*,

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que l'intervention de la législature qui subventionnait ce chemin, était encore devenue nécessaire pour en faciliter la construction en modifiant les conditions précédemment exposées concernant l'émission de bons. Ce préambule fait voir que ce n'est qu'après un complet examen de la position des affaires de la compagnie que la législature a acquiescé aux demandes qui lui étaient faites. Le préambule ne contient pas seulement l'énoncé du fait que 45 milles de chemin ont été complétés ; il va beaucoup plus loin ; il dit que la preuve en a été faite en s'exprimant ainsi, " et attendu qu'il appert que lorsqu'une longueur totale de quarante-cinq milles de la ligne de la compagnie a été complétée, une première et une seconde émission des débentures de la compagnie ont eu lieu chacune pour un montant de cent mille livres, chacune des dites émissions consistant en mille débentures de cent livres chacune." Ces expressions ne constituent pas seulement une énonciation d'un fait, elle comporte de plus la déclaration que le fait a été constaté—qu'une première et une seconde émission avait eu lieu. Mais dit l'intimé ce fait n'étant pas exact et ne se trouvant que dans le préambule, il peut être contredit et il offre une preuve testimoniale à cet effet. Mais cet avancé est-il correct, ne trouve-t-on que dans le préambule la mention de la seconde émission ? N'y a-t-il pas dans le corps de l'acte des expressions qui font voir que cette loi constate le fait d'une seconde émission ? La dernière partie de l'unique section de ce statut ne peut laisser aucun doute à cet égard ; elle dit positivement qu'il ne restait alors que les bons de la 3me émission. C'était donc positivement déclarer dans le corps de l'acte que les deux autres émissions avaient été faites. C'était répéter la déclaration du préambule.

Le but principal de cet acte était sans doute de changer les conditions de la 3me émission qui, d'après la 37me *Vic.*, ch. 23, ne pouvait avoir lieu qu'après l'achè-

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vement des 75 milles, en permettant de faire cette émission aussitôt après l'achat des rails, et c'est en accordant cette faculté que la loi reconnaît la validité des deux autres émissions dans les termes suivants, " et aussitôt que les rails et les attaches requis pour l'achèvement des quarante-cinq milles restant ou à peu près de la ligne de la Compagnie auront été achetés, alors les mille bons restant de cent livres sterling chacun, qui seront désignés comme étant la troisième émission, pourront être émis par la compagnie." Après la mention faite dans le préambule des deux premières émissions, la déclaration dans cette section que la troisième peut-être faite suivant les nouvelles conditions n'est-elle pas une reconnaissance formelle et positive de la légalité des deux autres ? Ceci me semble démontrer clairement que la question ne pouvait pas être résolue pas le seul examen du préambule,—qu'il fallait de plus examiner l'acte dans son ensemble.

Il y a encore à considérer le fait important de la date des bons de la 2me émission, et celle de la sanction de l'acte 39 *Vic.*, ch. 57. Ces bons avaient été préparés le 25 janvier 1875, longtemps avant la passation de la 39 *Vic.*, ch. 57. Dans quel but en a-t-on fait mention dans ce dernier acte ? Doit-on supposer que cette mention est tout à fait oiseuse et faite sans aucune intention quelconque d'utilité de la part des intéressés ? On a sans doute pensé qu'après l'émission faite il y avait avantage à constater comme un fait légal ces deux émissions. S'il y avait la condition de construire 45 milles avant de pouvoir faire la 2me émission, il y avait aussi à l'émission des premiers bons une condition fort importante, celle de racheter, avec le produit de ces bons, tous ceux émis en vertu de la 4me section de la 36me *Vict.*, ch. 45. En présence de cette condition on comprend qu'il était du plus haut intérêt, pour la compagnie et pour les porteurs de bons, d'avoir une décla-

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ration statutaire reconnaissant la validité de ces émissions.

Voici ce que dit *Taylor On Evidence*, (1) :—

The solemnity of an act done, though not done in court, will also, sometimes, raise a conclusive presumption in its favour.

Et s'il est vrai de dire :—

But in general a local and private statute, though it requires a clause requiring it to be judicially noticed, is not, as against a stranger, any evidence of the facts recited (2).

Il est aussi juste de dire que lorsque la personne qui attaque la vérité du fait attesté, n'est pas étrangère à l'acte, la présomption légale de la vérité du fait est complète comme le dit *Parke, B.*, dans la cause de *Ballard* v. *Way* (3) :—

This is an incumbrance created by a private act to which the defendant may be considered a party, and, therefore, it is the same as if there had been an agreement with him.

Si la demande à la législature est faite dans l'intérêt des porteurs de bons de la 1ère et 2me, aussi bien que ceux de la 3me émission, et suivant l'autorité ci-dessus ils doivent être considérés comme parties à l'acte, et ne doivent pas être admis à prouver que l'émission a été irrégulière dans le cas même où cette preuve eût été possible. En conséquence je suis d'avis que la preuve faite par l'intimé en cette cause au sujet des irrégularités qui peuvent avoir eu lieu lors de l'émission est inadmissible.

Une considération qui n'est pas sans importance, c'est que l'appelante n'était devenue acquéreur des bons de la 2me émission que longtemps après la passation de la 39me *Vict.*, qui en reconnaît la validité, il n'était pas nécessaire pour elle de porter ses perquisitions au-delà du statut pour savoir si leur émission était légale, les ayant acquis de bonne foi sur l'autorité des déclarations

(1) P. 95.
(2) P. 1377.
(3) 1 M. & W., 530.

solennelles du statut, cela devait lui suffire pour se convaincre de leur légalité.

C'est sans doute dans ce but qu'elles ont été mentionnées non seulement dans le préambule, mais aussi à la fin de la section première ; autrement il faudrait en conclure que cette mention a été insérée sans réflection et par pure ineptie de la part du rédacteur du bill. Mais comme on en voit fort bien l'utilité, on doit être convaincu que l'acte n'a été ainsi fait qu'à la demande de tous les intéressés, parmi lesquels étaient sans doute les porteurs des bons de la première émission.

Quant aux arguments de l'intimé au sujet du défaut d'avis aux porteurs de bons, et aussi à ce qu'il a dit de la manière dont se fait la preuve des préambules des actes, je ne crois pas qu'il soit utile d'y répondre autrement qu'en disant qu'on doit présumer que toutes les procédures nécessaires ont été régulièrement faites.

L'avis donné devait mettre tous les intéressés sur leur garde, et ils n'ont aucun droit de se plaindre qu'on a décidé sur leurs intérêts sans les avoir entendus.

Si, comme je le crois, la position prise par l'hon. juge de la Cour inférieure est erronée ; si j'ai établi que la loi a voulu parler des deux émissions en question comme étant légalement faites, il ne resterait donc plus qu'à savoir si la législature de *Québec* avait le pouvoir de faire ce qu'elle a décrété.

Il me semble que cela ne peut faire le sujet d'un doute raisonnable. Il s'agissait, dans tous les statuts ci-dessus cités, de législation au sujet d'un chemin de fer local commençant à *Lévis* et se terminant à la frontière du *Maine*. Le pouvoir de la législature de *Québec* à cet égard ne peut être mis en contestation. Toutes les dispositions de ces divers actes étaient dans les limites de ses attributions, et doivent recevoir leur effet.

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Mais en supposant que la 39me *Vict.*, ch. 57, n'aurait pas tranché la question et qu'il n'y aurait en faveur de l'appelante qu'une énonciation qui pourrait être contredite, l'intimé en a-t-il détruit la vérité par une preuve légale ? Les bons de la 2me émission qui sont les titres de la créance de l'appelante, sont en forme authentique et faits conformément aux divers actes concernant l'incorporation du chemin de *Lévis* et *Kennebec*, et conformément aussi à l'acte des chemins de fer de *Quebec*. Ils sont revêtus des signatures des président et secrétaire, et portent le sceau officiel de la dite compagnie. A leur face ces titres sont parfaits et l'on doit, d'après la maxime, *Omnia praesumuntur ritè et solenniter esse acta*," les considérer prouvant un titre parfait, jusqu'à preuve du contraire. Comme actes officiels, la présomption légale qu'ils ont été dûment exécutés est en leur faveur *Brown.* (1) :

Again, where acts are of an official nature, or requiring the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is, *Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium.*

On peut encore invoquer en faveur de leur légalité, la présomption que les conditions dont la violation ferait de leur émission un acte frauduleux, ont été duement exécutés.

It is a well established rule that the law will presume in favour of honesty and against fraud (2).

Dans le cas où les bons en question seraient considérés comme des actes de particuliers, les mêmes présomptions devraient s'appliquer à leur validité, car ils sont revêtus des formes les plus solennelles que la loi exige pour la perfection d'un titre.

As regards the acts of private individuals, the presumption, *ommia rite esse acta*, forcibly applies where they are of a formal character

(1) Legal maxims, p. 848. (2) Id. P. 849.

as writings under seal. Likewise upon proof of title, everything which is collateral to the title will be intended, without proof; for, although the law requires exactness in the derivation of a title, yet, where that has been proved, all collateral circumstances will be presumed in favour of right.

On the same principle, it is a general rule, that when a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shown,—*stabit præsumptio donec probetur in contrarium*; negative evidence rebuts this presumption, that all has been duly performed (1).

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L'appelante se présente donc ici avec un titre qui doit être considéré comme parfait *donec probetur in contrarium.* Mais comment doit être faite cette preuve pour opérer la destruction de ce titre? La loi anglaise pas plus que celle de la province de *Québec* n'admet la preuve testimoniale en pareil cas. C'est la seule que l'intimé a offerte.

Il a fait entendre deux témoins MM. *Lesage* et *Demers* pour leur faire déclarer qu'il n'avait été fait et complété que 43½ milles. Leurs déclarations verbales peuvent-elles être opposées aux déclarations positives de la loi qui fait voir le contraire. Aux termes de la 37me *Vic.*, ch. 23, la seconde émission ne devait avoir lieu que sur un certificat de l'ingénieur-en-chef que 45 milles avaient été complétés et mis en opération. Cette preuve verbale est donc absolument inutile et d'aucun effet.

L'ingénieur-en-chef *Light* a aussi été entendu comme témoin. Il dit qu'il n'est pas bien sûr de la longueur du chemin qui avait été exécuté, mais qu'il a déduit 1½ mille qui n'était pas complété. Que restait-il à faire pour le terminer? Il n'en dit rien, y avait-il encore de l'ouvrage à faire pour un dollar ou pour des milliers? On n'en sait rien, mais il ajoute qu'il a fait à ce sujet un rapport qui a été remis à l'hon. M. *DeBoucherville*, alors ministre des chemins de fer. Ce témoignage est tout-à-fait illégal d'abord parce qu'il tend à contredire par témoins une déclaration de la loi, et ensuite parce

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(1) Brown's Legal maxims p. 852.

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que l'existence d'un rapport étant prouvée, la preuve testimoniale de son contenu ne pouvait être reçu.

The contents of a written instrument, which is capable of being produced, must be proved by the instrument itself, and not by parol evidence * * * The fact that in cases of this kind the writing is in the possession of the adverse party does not change its character, its absence must be accounted for by notice to the other party ot produce it, or in some other legal form, before secondary evidence of its contents can be received (1).

La preuve est claire et précise qu'un certificat a été donné et rien n'en explique l'absence de production.

L'admission de ce témoignage est une violation des règles de la preuve. Le rapport ou certificat seul aurait pu faire preuve du fait qu'il n'y avait eu que 43½ milles de complétés. Le défaut de production de ce rapport par l'intimé doit faire présumer que le rapport en question n'aurait pas prouvé ce que dit *Light*. De plus n'aurait on pas dû faire la preuve que l'ouvrage incomplet pour lequel *Light* avait fait une diminution de 1½ mille, n'avait pas été complété depuis son rapport ?

En conséquence il me paraît impossible d'en venir, comme le jugement de 1re instance l'a fait, à la conclusion que les bons de la 2me émission sont nuls et que les porteurs de la 1ère doivent au mépris des termes positifs du statut déclarant qu'il n'y aura aucune priorité entre ces bons, absorber tout le produit de la vente du chemin de *Lévis* et *Kennebec*, qui était affecté à la garantie des bons de la première comme de ceux des deuxième et troisième émission.

Pour ces motifs et pour ceux exprimés par l'honorable juge *Tessier*, je suis d'opinion que l'appel devrait être alloué, que la contestation de l'opposition de l'appelante, faite par l'intimé, devrait être renvoyée et que l'appelante devrait être colloquée concurremment avec l'intimé pour le montant de son opposition sur le produit de la vente du chemin de *Lévis* et *Kennebec*. Le tout avec dépens.

(1) Taylor on Evidence Pp. 358 & 366.

HENRY, J.;—

A company called the *Levis and Kennebec Railway Company* was incorporated by an act of the legislature of the province of *Quebec*, in 1869 (32 *Vic.*, chap. 54.) That act was subsequently amended by 36 *Vic.*, chap. 45; again amended by the 37 *Vic.*, chap. 23, and again by the 39 *Vic.*, chap. 57.

Over forty miles of the railroad was built and in running order, and, on the 22nd of March, 1881, the right and title of the company in the railway was sold at auction by the sheriff of the district of *Quebec*, under an execution at the suit of "*The Wason Manufacturing Co.*, to the respondents, for $192,000.

Upon this sale the *Quebec Central Railway Co.*, the present respondents, fyled an opposition claiming the sum of $272,537.34, being the amount of several sterling bonds of the *Levis and Kennebec Railway Co.* mentioned in the opposition. The corporation of *Quebec*, the present appellants, also fyled an opposition based upon a number of bonds alleged to be held by them, and for the amount of which they also claimed to be collocated upon the proceeds of the sale. The opposition of the latter was contested by the former on the ground that the bonds held by them were illegally issued, and consequently null and void, and this contestation was maintained by the judgment of the Superior Court, rendered on the 19th December, 1882, and subsequently affirmed by a majority of the Court of Appeal in *Quebec*, Mr. Justice *Tessier* dissenting.

The first section of the act 37 *Vic.*, ch. 23, is as follows (1):—

The following is the preamble and a part of section one of 39 *Vic.*, ch. 57 (2):

By section one the restriction contained in the Act 37 *Vic.*, ch. 23, was repealed, so far as related to the third

(1) See p. 568. (2) See p. 568.

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issue of the company's bonds, until the full completion of the ninety miles; and the following provision was substituted:

So soon as the rails and fastenings required for the completion of the remaining forty-five miles or thereabouts of the company's line shall be provided, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company.

Here then, is, in my opinion, a legislative declaration of the validity of the first and second issues of the bonds. The fact of the completion of the first forty-five miles of the railroad, is particularly referred to in the preamble; and that fact having been ascertained, the condition upon which the third issue was provided to have been made, was ameliorated; and the enacting words have virtually incorporated the statement in the preamble, as to the first forty-five miles having been completed. If that position is tenable, then the evidence on the trial cannot affect the legal rights of the holders of the second issue of the bonds. The Legislature of *Quebec* had jurisdiction over the subject matter; and legal tribunals cannot resist its declaration, no matter upon what evidence that might be produced.

The words in section 1 of 37 *Vic.*, ch. 23, are:

And as soon as forty-five miles shall have been certified as complete and in running order as aforesaid, then a further issue of one thousand bonds of one hundred pounds sterling each, to be termed the second issue, may be made by the company.

If the necessary certificate was issued, then the rights of the bondholders of the second issue, acting on the certificate, could not be affected, in my opinion, by evidence subsequently, that when it was issued, the forty-five miles, although certified as provided by section one, were not fully completed. It was to the certificate alone that purchasers of the bonds had to look. That was the security and the only one provided for them by the legislature, and when that certificate

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was executed and issued by the proper officer, the liability under the bonds when issued attached. A certificate was duly issued before the sale of the bonds, but it was not given in evidence; and it may be questionable whether any evidence as to the condition of the first forty-five miles at the time was regular. If the bonds were purchased and held on the security of the certificate, it should have been produced by the respondents; or, if none such were given, that fact should have been shown. It is shown, however, that a certificate was given by the inspecting engineer of the government, and lodged with the Minister of Railways of the province of *Quebec*. That document was, then, the best evidence, and should have been produced. The contents of it were not attempted to be given; and could not have been, unless the original could not be produced. The holders of the bonds are *primâ facie* entitled to share in the proceeds of the sale left after paying the execution creditor; and the onus of the illegality of the issue raised was on the respondent company. They, in my opinion, were bound to shew the illegality of the issue of the bonds held by the appellants. The respondents rely on two allegations in one of their pleas, "that forty-five miles of the said company's railway "have never yet been built and in running order, nor "certified as such by the government inspecting "engineer." I have already stated my opinion, that it would not invalidate bonds purchased on the security of the certificate, provided for by the Act, even should it be shown, that through mistake or otherwise the road was certified to be completed when it was not; and that consequently such an issue would be immaterial. I have also stated my opinion that when it was once shown or admitted, as it was, that a certificate was issued, and available, it should have been produced by the respondent company before being

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permitted to go into evidence of the state of the forty-five miles. It is quite possible that the engineer may have given a certificate for the whole distance of forty-five miles, and subsequently found it was somewhat short of that distance, but that, in my opinion, would not affect the certificate. The appellants are, in my opinion, justly entitled to a participation in the funds in question as bond-holders; and to deprive them of it, the best available evidence should be required to show the illegality of the issue. Such evidence has not I think been given. Even had it been, I think the issue of the bonds was legislatively sanctioned, as before pointed out.

For these reasons I think that the appellants are entitled to the judgment of this Court with costs.

GWYNNE, J.:—

The point which is raised upon this appeal is one of the gravest nature, the importance of which, as it appears to me, cannot be over estimated, affecting as it does the value and character of debentures of a railway company, issued and placed upon the money markets of the world, and there sold to innocent persons who purchased them for value in the confidence and assurance solemnly published on the face of the debentures, that they have for their validity the sanction and guarantee of the Legislature of the Province of *Quebec*, but which, as now appears, are (by the judgment of the courts of the province upon the authority of whose Legislature the debentures upon their face profess to have been issued) pronounced to have been illegally issued—and without the sanction or authority of any law—and to be of no value or effect whatever, and to be, in fact, no better than waste paper.

A difficulty has *in limine* suggested itself to my mind, namely—whether upon the proceeding which is

now before us, and in view of the transaction out of which (as appears by the appeal case submitted to us,) it originates, the record is so framed that a judgment to the effect that the debentures in question are absolutely invalid, as they have been pronounced to be by the judgment of the courts of the Province of *Quebec*, can have any judicial force and effect?

By the appeal case it appears that the proceeding before us originates in a judgment recovered in the Superior Court of the Province of *Quebec*, on the 20th day of January, 1877, by the *Mason Manufacturing Co.* against the *Levis & Kennebec Railway Co.*, a company incorporated and having certain powers and privileges conferred upon it by 32 *Vic.* ch. 54 and certain other acts in amendment thereof, passed by the Legislature of the Province of *Quebec*. To enforce execution of this judgment a writ of execution against the goods and chattels, lands, and tenements of the railway company was issued, addressed to the Sheriff of the district of *Quebec* whereby he was ordered to levy the sum of $4,688.33, (the amount of the judgment, with the interest thereon from the said 20th January, 1877,);—a return having been made by the Sheriff to this writ to the effect that he had seized the goods, lands and tenements of the company, but had not sold the same by reason of certain oppositions *à fin de distraire*, a writ of *venditioni exponas* was issued out of the Superior Court on the 3rd day of March, 1881, whereby, after reciting the previous writ, the sheriff's return thereto, and the proceedings had thereon, the sheriff was commanded that he should proceed according to law to the sale of the road called the *Levis and Kennebec Railway*, comprising the road made and built by the defendants, from and including the terminus thereof in the parish of *Notre Dame de la Victoire*, county of *Levis*, district of *Quebec*, up to and including the ter-

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minus in the parish of *St. Joseph*, district of *Beauce*, with the way and right of passage over the said extent as now established, the depots, stations, buildings connected with the said road and now occupied for the use of the said road, and ground occupied by the defendants for the said road, and the said depots, stations and buildings, also the rolling stock of the said road and which is found thereon, namely: Two engines and tenders, one first-class and four second-class passenger cars, twelve wood cars, two cattle cars, twenty-two large platform cars and six small ones, ten hand cars, nine laury cars, and one baggage and post office car, with all the rights of the defendants in and upon the road now in operation, and its right to continue and extend the same to the boundary line of the State of *Maine*.

Now, by what law can a sheriff by a sale such as that here directed, transfer to a purchaser from him, not only all the rolling stock, goods and chattels of the company, but also the railway itself, the depots, stations and buildings, and the lands on which they are erected, together with the rights of the defendants in and upon the road as in operation, and the right of the company to extend the same to the boundary line of the State of *Maine*—in short, all the corporate estate and all the corporate powers, rights and privileges of the company?

The sheriff, however, has returned that to satisfy the judgment of $4,688.33, with interest from the 20th day of January, 1877, not that he had sold a portion of the chattel property of the company, which he had under seizure, of a value apparently five or six times the amount of the judgment, and that he had thereby realised sufficient to pay and satisfy the judgment, but that he had on the 22nd of March, 1881, proceeded to the sale and adjudication of the said lands and tenements and sold the same to the *Quebec Central Railway Co.*

for the sum of $192,000; the right to participate in which sum is the question now brought before us.

Now, it is to be observed, not only that there does not appear to have been any occasion for the sale of any lands and tenements belonging to the company, inasmuch as it does not appear that the goods and chattels which the Sheriff had returned that he had under seizure, were first sold and found to be insufficient to satisfy the judgment, but further the *Quebec Central Railway Co.* which was incorporated for building and working a totally different railway had no power or authority whatever to acquire the *Levis* and *Kennebec* railway, nor had any person or company such power or authority. A railway consisting of its road way, stations, buildings, and other real estate necessary for the working of and for the use and enjoyment of the railway as a going concern, is a species of property which is capable of being held, worked, used and enjoyed only by the body corporate created by the Legislature for that special purpose, no other person or body corporate could acquire the property, powers, and privileges held by the *Levis & Kennebec Railway Co.* for the working of their railway, unless specially authorized by the Legislature for that purpose, and the Sheriff, therefore, could not, under the ordinary process of execution divest the company of such property, and vest it in a person or company not capable of taking and holding it for the purpose for which alone it was authorized to be constructed, and the property in question here, namely, the *Levis* and *Kennebec* railway, so far as constructed, being capable of being, and being, hypothecated to persons who advanced their money upon the security of having a lien upon the whole of the work as a going concern, to permit such property to be sold as bare lands and tenements divested of the corporate privileges annexed to them in the possession

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of the company, thus stripping the property of the whole of its value as security as a going concern for the money advanced upon it as such by the hypothecary creditors; and to compel them to accept, in lieu of their hypotheques upon the property as a going concern, the money realized by a sale of the naked lands and tenements divested of the corporate powers and privileges annexed to it as a going concern, would be such a fraud upon the hypothecary creditors that I cannot well see how it could receive the sanction of law apart from all authority upon the subject. It has, however, been decided in the Province of *Quebec* where the railway in question here is situate, that a railway of an incorporated company cannot be seized in execution of a judgment or sold at sheriff's sale. *The County of Drummond* v. *S. E. Ry. Co.* (1) This is the established law also of the province of *Ontario*, as well as in *England*. If, then, the sale of the *Levis and Kennebec Railway* professed to have been made by the sheriff, and by which the money was realised the appropriation of which is under consideration here, was illegal and void, with what propriety can a court of justice interfere by adjudicating upon the legal rights of parties to moneys which upon the record before the court are shewn to be the proceeds of an illegal and void sale?

Would not an adjudication as to the distribution of the moneys which are the proceeds of the sale, if it should have any judicial effect, be *ipso facto* an affirmance of the illegal sale?

Should a court pronounce a judgment in any matter, however brought before it, which, if it has any judicial effect, deprives absent hypothecary creditors of the *Levis and Kennebec Railway Co.* of the benefit of their securities?

The corporation of the city of *Quebec* appear by the

(1) 22 L. C. J. 25.

record to be holders of but a portion of the debentures of that class or issue, the whole of which the court has pronounced to be void and of no force or effect whatever. Can, then, a court with any propriety pronounce debentures of a railway company, sold as good and valid securities to purchasers for value, to be null, void and of no effect, in the absence of a representation of all persons holding such securities ; or otherwise than in a suit properly framed, so that judgment therein shall be effectual to bind all persons holding like securities ? To have them pronounced to be null and void may be, and no doubt is, a matter of some importance to the *Quebec Central Railway Co.*, who, after the illegal sale to them of the property of the *Levis and Kennebec Railway Co.* stripped of all its value as a going concern for a sum about one-fifth of the amount of the debentures hypothecated upon it, have, by an act of the legislature, acquired all the corporate rights and privileges of the former company, in which rights and privileges consisted the chief value of the hypothecary securities, which rights and privileges and corporate property they now hold under an act which contains, however, this proviso, that nothing in the act contained shall in any wise affect the rights of the creditors of the *Levis and Kennebec Railway Co.* I confess, however, that I cannot bring my mind to think that it was competent or proper for the Court upon this proceeding, or otherwise than in a suit properly framed, to which all persons interested shall be parties, including the *Levis & Kennebec Railway Co.*, and all persons claiming to be their hypothecary creditors, to pronounce a judgment to the effect that the *Levis & Kennebec Railway Co.* never became or were indebted to the purchasers of any of the debentures belonging to the class or issue to which those of which the city of *Quebec* are now the holders belong, in respect of the moneys received by the rail-

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way company upon the sale of and upon the security of those debentures, but that all debentures of that class or issue, notwithstanding that they were sold by the company to purchasers for full value, always have been and are null and void, having no validity, force or effect whatever in law and equity against the company that issued them and received value for them. That they were so null and void is, in my opinion, the sole substance and effect of the judgment pronounced by the courts of the Province of *Quebec* in this case, all the rest of the judgment is merely consequential upon such adjudication of nullity, and it is from this adjudication of nullity that this appeal is taken.

Assuming it to be competent for the Court, notwithstanding the points of difficulty above referred to which have suggested themselves to my mind, to pronounce such a judgment in a proceeding framed as the present is, it remains to be considered whether the judgment can be sustained upon the merits.

By the 32 *Vic.* ch. 54, as amended by 36 *Vic.* ch. 45 and 37 *Vic.* ch. 23 of the statutes of the Province of *Quebec*, the *Levis & Kennebec Railway Co.* were authorized, by a resolution of the directors of the company to that effect, to issue their bonds or debentures for the purpose of raising money to prosecute their undertaking. The statutes enacted that such bonds should be signed by the President and countersigned by the Secretary-Treasurer with the seal of the company thereto affixed. That they should constitute a privileged claim upon the personal property of the said company, and shall bear hypotheque from the date of the resolution authorizing the same on the immoveable property belonging to the company, and this without any registration. That the company should have power to issue the bonds to the amount of £300,000 sterling, in bonds for not less than £100 sterling each, pro-

vided always that until 45 miles of the railway should be completed and in running order, of which the certificate of the inspecting engineer of the government should afford proof, no more than one thousand of said bonds of £100 sterling each, to be termed the "first issue," should be issued by the company, and that so soon as a certificate as aforesaid should be given, certifying that the said 45 miles are complete and in running order, a further issue of one thousand bonds of £100 sterling each, to be termed the "second issue," might be made by the company; and that no further bonds should be issued by the company until 75 miles of the said road (including the 45 miles above mentioned) should be completed and in running order, according to the certificate of the inspecting engineer of the government; and that so soon as it should be certified that the said 75 miles are completed and in working order as aforesaid, the last thousand bonds of £100 sterling each, termed the "third issue," may be issued by the company, it being understood and declared by the statute that the expressions "first issue," "second issue" and "third issue" were used merely for convenience, and that they should not be construed as giving to any of those issues priority over the others.

The company adopted the following form of bond for the purposes of the three several issues above mentioned, showing upon the face of every bond (no matter to which issue it should belong), that each bond issued was one of the whole 3,000 authorized to be issued and which constituted an hypothecary charge upon the property of the company, a precaution which, I apprehend, was adopted as being deemed of some importance in the English market, upon which, as appears as well from the directions in the statute, that the bonds should be issued for sterling money, as from the terms of the

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bonds themselves, it was contemplated to offer them for sale :—

LEVIS AND KENNEBEC RAILWAY COMPANY.

PROVINCE OF QUEBEC, DOMINION OF CANADA.

Incorporated by a special act of the legislature of the province of Quebec, assented to the 5th day of April, 1869, amended by an act assented to the 24th day of December, 1872, and further amended by an act assented to the 28th day of January, 1874.

STERLING DEBENTURE.

Bearing interest at the rate of 7 per centum per annum, payable on the first days of January and July in each year, in the city of *London, England.*

Know all men by these presents that the *Levis and Kennebec Railway Co.* under the authority of the above mentioned acts, and of the *Quebec* Railway Act, 1869, promises to pay to the bearer of this bond, in the city of *London, England,* on the 1st day of January, 1894, the sum of £100 sterling, value received, with interest thereon, at the rate of seven per centum per annum, payable semi-annually, according to the tenor of the coupons annexed. And for the payment of the said principal sum and interest the *Levis and Kennebec Railway Co.*, under the authority of the above mentioned acts, has hypothecated and does hypothecate the whole of the said *Levis and Kennebec Railway Co.'s* road, stations, permanent way, and all branches thereof constructed or to be constructed, rolling stock, machinery, fixtures, equipments, and all other the real and personal property of the company, and the tolls, income, rents and profits thereof or any part thereof, inclusive of a capitalized subsidy granted by the Legislature of the Province of *Quebec*, in Government 5 per cent. debentures, to the amount of $1,748 per mile, payable on completion of the first 25 miles of railway, and after upon each and every mile completed, together with all rights, easements and appurtenances thereto belonging or in any wise appertaining.

This debenture is one of an issue amounting to three hundred thousand pounds and consisting of three thousand bonds of one hundred pounds sterling each, and numbered consecutively from 1 to 3,000 inclusive, all of like tenor herewith.

SEAL. In witness whereof, the *Levis and Kennebec Railway Co.* has caused its corporate seal to be hereto affixed and the same to be attested by the signature of its President and Secretary, this day of

The company, as appears from a recital *in the pre-*

amble of the statute 39 *Vic.*, ch. 57, hereafter referred to, and the correctness of this recital is not questioned, executed bonds to the amount of and to represent the first and second issues authorized by the above acts, that is to say, for £200,000 of the £300,000 authorized by the acts. These bonds would seem to have been afterwards, but at what date does not appear, sent to a Mr. *Albert Grant* in *London*, to be disposed for the company upon the *London* market. From the opposition *à fin de conserver* filed by the appellants, it appears that the bonds, of which the appellants are the holders, being bonds to the amount of £30,000 sterling, all of which, from the numbers being above number 1,000 and under number 2,000, appear to belong to the second issue, were among those which were transmitted to Mr. *Grant*, and bear date the 25th day of January, 1875. There is nothing to show when these bonds were first sold. All that appears is that Mr. *Grant* at some time, but when is not stated, transmitted to the railway company their full face value of £30,000 sterling. The city of *Quebec* do not appear to have become holders of them until the month of January, 1877, long after the passing of the act 39 *Vic.*, ch. 57.

It is consistent with all that appears before us, and not at all improbable, I think, in view of the natural enquiries likely to be made by and on behalf of purchasers of these bonds for evidence of the fulfilment of the conditions precedent necessary to be fulfilled before the bonds could legally be issued, that none of those numbering over 1,000, that is that none of those constituting what is termed the "second issue" in the statute, were or could have been disposed of by Mr. *Grant* until after the passing of the Act 39 *Vic.*, ch. 57; and if the time of the sale of the bonds, as distinguished from the time of their being executed and issued by the company to be sold, is material, it certainly is not suffi-

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ciently shown to justify us in pronouncing bonds, which are good upon the face of them and in the hands of purchasers for value to be null and void, if being sold after, though issued before, the passing of the Act they would not be so. Now at the session of the Provincial Legislature held in December, 1875, the company, having thus already issued bonds to the full amount of the first and second issues, and there remaining to be issued only the "third" issue of £100,000 sterling to complete the whole amount which they were authorized to issue, petitioned the Legislature for a further amendment of their Acts, and thereupon the 39 *Vic.*, ch. 57 was passed, the preamble of which is as follows:

> Whereas the *Levis & Kennebec Railway Co.* have, by petition, prayed that the Act to amend their Act of incorporation may be amended; and whereas it is expedient to grant the prayer of their petition; and, whereas it appears, &c. (1).

It is to be observed here, 1st., that this Act is obtained upon the petition of the company, and, being passed at their instance and for their benefit, must be construed strongly as against them, and to give effect to their acts and contracts, and so validity to the bonds, which are therein recited to have been issued by them as and for the second issue of bonds, forming part of the £300,000 sterling, which they were authorized to issue, and, having so obtained the act, they must be estopped from questioning the validity of the bonds in the hands of purchasers for value (2). 2nd.—The act does not profess to be passed upon the supposition that, or upon any suggestion or representation that, before the issue of the bonds for £200,000 sterling in the act recited, the conditions precedent to their issue imposed by 37 *Vic.*, ch. 23, had been fulfilled. What is recited is very different and falls short of any such representation. What is recited, in substance and

(1) See p. 568

(2) *Priestly* v. *Foulds* 2 M & G 193.

effect, is that it appears to the satisfaction of the Legislature that after the company had performed work which, in the opinion of the Legislature, constituted a completion of the 45 miles, they issued the first and second issues of bonds amounting to £200,000 sterling in the whole. The recital does not say that the company had put the 45 miles in running order, or that the inspecting engineer of the Government had given his certificate to that effect. On the contrary, from what is recited, we must presume that the Legislature were well aware that no such certificate had been given, but that they were satisfied, from independent evidence taken by themselves, that the 45 miles had been substantially completed, and that with the other subsidies referred to in the preamble, legislative and municipal, enough appeared to justify the Legislature in authorising the remaining £100,000 sterling of the £300,000, which the company were authorized to borrow, to be raised by bonds of the last or third issue, under the altered conditions stated in the act. Accordingly the act, in lieu of the provisions in 37 *Vic.*, ch. 23, as to the conditions upon which the third issue might be made, enacts that:—

> So soon as the rails and ties requisite for the completion of the remaining 45 miles or thereabouts of the company's line shall be purchased, then the one thousand bonds remaining of £100 sterling each, which shall be designated as being the third issue, may be issued by the company.

Now, what is this but to say that bonds to the amount of £200,000 sterling, constituting the bonds which belong to what is termed the "first" and "second" issues, have been already issued, and that for the remaining £100,000 sterling of the total sum of £300,000 may, upon certain conditions, be issued by the company, which shall be regarded as being the third issue.

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Whether the recital in the preamble as to the time when the first and second issues are said to have taken place was true or not, is, as it appears to me, immaterial, for the Act is, in my opinion, quite insensible, unless, when authorizing the issue of the remaining one thousand bonds of the three thousand authorized to be issued, which are to be regarded as the third issue, it is construed as recognising as good, valid, and binding upon the company, the bonds to the amount of £200,000 constituting the first and second issues recited as having been already issued.

The only way in which bonds for the remaining £100,000 sterling could be, or could be treated as being the third issue of the £300,000 sterling bonds, is by regarding the bonds for £200,000 sterling recited as already issued, as effectually representing the "first" and "second" issues, and this wholly irrespective of, and so excluding, all enquiry as to whether or not the conditions precedent to their issue as required by 37 *Vic.*, ch. 23 had been fulfilled; and so, as it appears to me, the effect of the statute 37 *Vic.*, ch. 57, is to constitute the bonds, therein recited as having been already issued to the amount of £200,000 sterling, to be good and valid bonds binding upon the company, although the conditions precedent specified in 37 *Vic.* ch. 23 had not been fulfilled when they were issued.

It is quite unnecessary, in my opinion, to insist upon the recital of the bonds having been issued after the completion of the 45 miles, as affording evidence conclusive or otherwise, of the fact that the 45 miles had been completed in the sense of authorizing the bonds to have been issued under the provisions of 37 *Vic.* ch. 23; mere completion, of the 45 miles would not, as I have already said, have had that effect. The Act 39 *Vic.*, ch. 57 would be open, in my opinion, to the construction I put upon it, if nothing had been said in its

preamble about the 45 miles; if, for example, the recital had been as follows:

Whereas the *Levis & Kennebec Railway Co.* have by their petition prayed that the Act to amend their Act of incorporation may be amended; and whereas they have already issued a "first" and "second" issue of bonds, each of such issues consisting of one thousand bonds for £100 sterling each, making in the whole £200,000 sterling; and, whereas since the passing of the said amended Act the subsidies of the Provincial Legislature have been increased, &c., * * * (without saying anything about 45 miles); therefore, it is enacted, &c. * * *

But, in truth, the recital which is in the preamble of the Act is not contradicted or disproved by the evidence offered in this case. All that the evidence establishes is that the government inspecting engineer has never certified 45 miles, nor more than 43½ miles, as being complete and in running order, and that the government engineer upon some occasion, but when in particular does not clearly appear, it may have been after the passing of 39 *Vic.*, ch. 57, took off 1½ miles from the length of road which the company insisted upon as being completed, but which the government engineer did not consider completed; how far it was short of completion to satisfy him does not appear. Whether it would have required an outlay of ten dollars or more, and what sum, to complete the 1½ miles so "taken off," does not appear. Now, what the preamble recites is in effect, that the Legislature were satisfied that the 45 miles had been completed (a fact which might co-exist with the government engineer not being so satisfied,) in such manner as to warrant the Legislature in regarding them as complete and in recognizing the second issue equally as the first, and so justifying them in granting the prayer of the company's petition, as to the remaining £100,000 sterling to constitute the "third" issue.

After the passing of 39 *Vic.* the certificate of the

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government engineer was no longer a matter essential to be established, and by that Act, so obtained by the company, they were, in my opinion, for ever estopped from setting up in answer to any claim made for recovery of the amounts purported to be secured by bonds coming within the designation of the "second" issue, that those bonds had been issued *ultra vires*; and this, as appears to me, is all that is necessary to be, established; for if the company cannot dispute the validity of the bonds, they cannot always have been, and be null, void, and of no effect, as they have been pronounced to be by the judgment appealed against; and if they are good, valid, and binding upon the company in an action against them, they must be so, also, as against all creditors of the company holding bonds for other parts of the £300,000 sterling; for all bonds issued to that amount, to whatever class belonging, whether to the first, the second, or the third issue, are put upon the same footing, none having a preference over another. It is contended upon behalf of the *Quebec Central Railway Co.*, that, so to hold, would be inequitable and unjust towards them upon the ground that they, as holders of the bonds of the first issue, lose the benefit which the completion of the 1½ miles, which, in the opinion of the government engineer, the work done by the company falls short of 45 miles, would give to their securities, and they think it therefore equitable that they should have, as additional security for their bonds, the benefit which the outlay of the proceeds of the second issue to the amount of £100,000 sterling has contributed to the completion of the 43½ miles admitted to have been completed; but, in truth, the security of the holders of all the bonds is increased beyond what it originally was by the subsidies recited in 39 *Vic.*, ch. 57, and this claim of the *Quebec Central Railway Co.* is made in the face of the further fact, that they have

acquired the whole of the corporate estate, rights and privileges of every description of the *Levis & Kennebec Railway Co.* vested in them under a statute which enacts that nothing in that statute shall, in any wise, affect the rights of the creditors of the *Levis & Kennebec Railway Co.* If the *Quebec Central Railway Co.* cannot maintain their contention upon strict, rigid principles of law, as distinguished from equity, they cannot, in my opinion, upon principles of equity.

Assuming, therefore, the record of the case before us to be properly framed, so as to make an adjudication as to the validity of the bonds of the *Levis & Kennebec Railway Co.* of which the corporation of the city of *Quebec* are the holders effectual and conclusive, I am of opinion that they are good, valid and effectual against the *Levis & Kennebec Railway Co.*, and the property by the bonds purported to be hypothecated, and that they rank equally with the bonds of the same company held by the *Quebec Central Railway Co.*, and equally with those latter bonds affect all the property of the *Levis & Kennebec Railway Co.* by the bonds purported to be hypothecated.

This appeal, therefore, should, in my opinion, be allowed with costs.

Appeal allowed with costs

Solicitors for appellants: *Pelletier & Chouinard.*

Solicitors for respondents: *Irvine & Pemberton.*