

INDEX

	PAGE
Complaint	1
Answer	3
Stipulation	7
Exhibit 1	8
Motion for Judgment	16
Memorandum of Opinion	17
Judgment18
Notice of Appeal	19

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

LAURENCE B. LEVY,

Plaintiff,

v.

ATLANTIC CITY AND SHORE
RAILROAD Co.,

Defendant.

Action at Law.
Complaint.

10

Laurence B. Levy, of Philadelphia, Pennsylvania,
complains and says:

1. On December 1, 1905, defendant, a corporation
of the State of New Jersey, organized under the
general railroad act, executed and delivered to the
Girard Trust Company, a corporation of the State
of Pennsylvania, as trustee, its certain first mort-
gage covering all its then property and franchise,
&c., which said mortgage, after being duly executed
and delivered, was recorded in the clerk's office of
the County of Atlantic and State of New Jersey, and
is now physically in the possession of said Girard
Trust Company as trustee. 20

2. Said mortgage was given to secure an issue of
collateral trust 5% gold bonds, payable in forty
years from said December 1, 1905, to the amount of
one million dollars. 30

3. Accompanying each bond and attached to and made a part thereof were certain coupons.

4. Plaintiff is the holder and owner of ten of such bonds, each in the sum of \$1,000, each having attached thereto and made a part thereof coupons as stated, and which are made payable every six months from the 1st day of December, 1905, to wit, on the 1st day of December and the 1st day of June following said date, and which coupons read:

10 “Atlantic City and Shore Railroad Company will pay to the bearer at the office of Girard Trust Company in the City of Philadelphia, Pennsylvania, on the first day of June, 1924, Twenty-five Dollars in gold coin of the United States of America of the 1905 standard weight and fineness, being the semi-annual interest upon its first mortgage 5% gold coupon bond. John MacPeak, Treasurer.”

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The foregoing is the language of all the coupons save as to the date of payment.

5. Plaintiff is the holder and owner of all the coupons accompanying his said bonds, payment of which have matured since the first day of June, 1915, all of which have been presented for payment to the said Girard Trust Company, trustee, and payment refused.

30

6. Said coupons so held and owned and presented by plaintiff are the coupons which were due on December 1, 1915, and including those due on December 1, 1924, on each of said ten bonds of \$1,000 each, making a total of nineteen coupons on each bond, and in all one hundred and ninety coupons at

twenty-five dollars each, or the sum of four thousand seven hundred and fifty dollars.

Judgment will be claimed for the sum of four thousand seven hundred and fifty dollars with interest on each twenty-five dollar coupon from its respective due date to date, together with costs of suit.

COLE & COLE,
Attorneys of Plaintiff. 10

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

LAURENCE B. LEVY, 20
Plaintiff,)
v.) Action at Law.
ATLANTIC CITY AND SHORE) Answer.
RAILROAD Co.,)
Defendant.)

Defendant, Atlantic City and Shore Railroad Company, answering plaintiff's complaint, says: 30

FIRST DEFENSE.

1. It admits the allegations contained in paragraph 1.

2. It denies the allegations contained in paragraph 2, and says that said mortgage was given to secure such bonds, the payment of which were secured thereby, as should be sold and delivered to purchasers thereof, and that there were sold of said bonds and now outstanding bonds to the par value of nine hundred and fifty thousand dollars (\$950,000.00).

10 3. It admits the allegations contained in paragraph 3.

4. It admits the allegations contained in paragraph 4.

5. It denies the allegations contained in paragraph 5.

20 6. It neither admits nor denies the allegations contained in paragraph 6, and leaves plaintiff to prove the same.

SECOND DEFENSE.

1. That the interest mentioned in plaintiff's complaint, accrued and accruing on defendant's indebtedness, is a debt secured by the mortgage mentioned in plaintiff's complaint.

30

2. That the coupons are evidence of such accrued indebtedness.

3. That the bond, coupons and mortgage evidencing an indebtedness of defendant mentioned by plaintiff in plaintiff's complaint, were given for the same debt.

4. That no proceedings for the foreclosure of said mortgage have been had or taken.

5. That because no foreclosure proceedings have been instituted to foreclose said mortgage, plaintiff, by reason of the statute of this state, entitled "An act to amend an act entitled 'An act concerning proceedings on bonds and mortgages given for the same indebtedness, and the foreclosure and sale of mortgaged premises thereunder,' approved March 12th, 1880," Pl. L. 1881, p. 184, is barred from having or maintaining this suit. 10

THIRD DEFENSE.

1. That by the terms of the bonds mentioned in plaintiff's complaint and now in the actual possession of plaintiff, plaintiff is referred to the indenture of mortgage for a statement of the nature and extent of the security and the rights of the bondholders under the same. 20

2. That the witnessing clause of said mortgage is in language following:

"NOW, THEREFORE, THIS INDENTURE WITNESSETH, That in order to secure the payment of the principal and interest of all of said first mortgage forty (40) year five per cent gold bonds of the Railroad Company at any time issued and outstanding under this Indenture, and in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, the Railroad Company has granted, bargained, sold, aliened, released, &c." 30

STIPULATION.

ATLANTIC COUNTY CIRCUIT COURT.

<p>LAURENCE B. LEVY, <i>Plaintiff,</i></p> <p>v.</p> <p>ATLANTIC CITY AND SHORE RAILROAD Co., <i>Defendant.</i></p>	}	<p>Action at Law. 10 Stipulation.</p>
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It is stipulated and agreed by the respective attorneys in the above stated cause that the Atlantic City & Shore Railroad Company was organized on December 1, 1905, under the General Railroad Act of April 14, 1903 (Pamphlet Laws, p. 645), and on the 1st day of December, 1905, executed and delivered to the Girard Trust Company, trustee, its bonds of the denomination of \$1,000 each, with interest coupons at the rate of 5% per annum attached, amounting to \$1,000,000, and secured payment of the same by a mortgage payable to Girard Trust Company, trustee, on all its real property, a copy of which mortgage, bonds and interest coupons is marked 1377; \$950,000 of which bonds, with the interest coupons attached, have been sold and are outstanding. 20 30

That plaintiff is the owner and holder of 10 bonds with interest coupons attached, secured by said mortgage.

That defendant has failed to pay the interest

coupons to plaintiff since the 1st day of December, 1915.

That plaintiff in this suit claims interest at the rate of 5% per annum on his bonds of \$10,000 from December 1, 1915, until December 1, 1924. Said mortgage is still an outstanding, undue live obligation and no suit has been instituted to foreclose the same, and the holders of 50% in amount of the outstanding bonds have never requested the trustee to
10 foreclose said mortgage.

COLE & COLE,

Attorneys for Plaintiff.

BOURGEOIS & COULOMB,

Attorneys for Defendant.

Dated November 12, 1925.

20

EXHIBIT 1.

INDENTURE.

THIS INDENTURE, dated the first day of December, A. D., 1905, but actually executed on the tenth day of February, 1906, by and between Atlantic City and Shore Railroad Company (hereinafter called the Railroad Company) a corporation duly organized and existing under the laws of the State of New Jersey, party of the first part, and
30 Girard Trust Company (hereinafter called the Trustee) a corporation duly organized and existing under the laws of the State of Pennsylvania, party of the second part.

* * * * *

WHEREAS, The Railroad Company in order to provide for the execution of its lawful corporate purposes and for the acquisition of its property, and

for the work of erection, construction and equipment as above set forth, deems it necessary that it shall create its forty (40) year five per cent gold bonds of an aggregate amount of One Million (\$1,000,000.00) Dollars, (of which amount Seven Hundred and Fifty Thousand (\$750,000.00) Dollars shall be presently issued), and to be secured by mortgage upon its property, its rights and its franchises; and

WHEREAS, Each of the said bonds and the coupons to be attached thereto for each of the semi-annual instalment of interest shall be substantially of the following tenor:

UNITED STATES OF AMERICA.

STATE OF NEW JERSEY.

ATLANTIC CITY & SHORE RAILROAD
COMPANY.

First Mortgage and Collateral Trust five per cent.
Gold Bond.

20

ATLANTIC CITY & SHORE RAILROAD COMPANY, a corporation created and existing under the laws of the State of New Jersey, for value received, hereby promises to pay on the first day of December A. D. 1945, at the office of Girard Trust Company, in the City of Philadelphia, Pennsylvania, to bearer, or, if registered, to the registered holder of this bond, the sum of One thousand dollars (\$1,000) in gold coin of the United States of America, of or equal to the present standard of weight and fineness, and to pay interest thereon from December 1st A. D. 1905, at the office of the said Girard Trust Company, semi-annually in like gold coin, at the rate of five per cent per annum, on the first days of the months of June and December in each year until the said principal sum is paid, said interest to be payable only upon presentation and surrender of the respec-

30

tive coupons for such interest hereto attached, as they severally mature. The payments, both of principal and interest, shall be made without any deduction by reason of any tax or assessment which the said Atlantic City & Shore Railroad Company may be required to pay thereon or to deduct therefrom under any law of the United States or of any State, County or Municipality therein. This bond is one of a series of bonds of Atlantic City & Shore Railroad Company of like tenor, date and effect, amounting in the aggregate to the sum of one million dollars (\$1,000,000), all of which have been issued or are to be issued pursuant to, and are equally secured, both as to principal and interest, without priority, preference or distinction, by an Indenture of Mortgage, bearing even date herewith executed and delivered by Atlantic City & Shore Railroad Company to Girard Trust Company, a corporation organized and existing under the laws of the State of Pennsylvania, and having its office in the City of Philadelphia, in the said State, as Trustee, which Indenture of Mortgage covers and embraces all of the property and franchises now owned or hereafter acquired by Atlantic City & Shore Railroad Company, including certain shares of corporate stock and certain corporate bonds, which have been deposited with said Trustee, or will be hereafter deposited and also including a certain agreement between West Jersey and Sea Shore Railroad Company, and Atlantic City & Shore Railroad Company and Central Passenger Railway Company, all of which more particularly appears in the said Indenture of Mortgage. Reference is hereby made to said Indenture for a statement of the nature and extent of the security, the rights of the holders of bonds under the same, and the terms and conditions upon

which said bonds are issued and secured. Atlantic City & Shore Railroad Company may redeem this bond at any interest period at 110 per centum and accrued interest from the date of the last payment to the date fixed for such redemption upon the terms and conditions specified in the said Indenture. This bond shall pass by delivery, unless it be registered in the holder's name on the books of the Company, and such registration noted on this bond by the Company. If so registered, no transfer shall be valid except when made on the said books by the owner, in person or by attorney, and similarly noted on this bond, unless the last registered transfer shall have been to bearer, in which event this bond shall again pass by delivery but shall continue susceptible of successive registrations. The negotiability, by delivery, of the annexed coupons shall not, however, be affected by the registration of this bond. It is expressly agreed that no recourse for the payment of the principal or interest of this bond shall be had against any stockholder, officer or director of Atlantic City & Shore Railroad Company, either directly by the holder hereof, or through the said Atlantic City & Shore Railroad Company, under any law now in force or hereafter enacted, and all liability of stockholders, directors and officers of the Atlantic City & Shore Railroad Company is hereby released. This bond shall not be valid unless authenticated by a certificate duly signed by the Trustee named in the said Indenture. This bond is issued under and subject to the rights, privileges, stipulations, covenants and conditions contained in the before mentioned agreement between West Jersey and Sea Shore Railroad Company, and Atlantic City & Shore Railroad Company and Central Passenger Railway Company.

IN WITNESS WHEREOF the said Atlantic City & Shore Railroad Company has caused its corporate seal to be hereunto affixed, and this bond to be subscribed by its President and Secretary, and has caused the coupons hereto annexed to be authenticated by the engraved fac simile of the signature of its Treasurer, this first day of December in the year One Thousand Nine hundred and Five.

* * * * *

10

FORM OF COUPON.

Atlantic City & Shore Railroad Company will pay to the bearer at the office of Girard Trust Company in the City of Philadelphia, Pennsylvania, on the first day of \$25.00 in gold coin of the United States of America of the 1905 standard of weight and fineness, being the semi-annual interest upon its First Mortgage Five per cent. Gold Coupon Bond No.....

20

.....

Treasurer.

* * * * *

NOW, THEREFORE, THIS INDENTURE WITNESSETH, That in order to secure the payment of the principal and interest of all of said first mortgage forty (40 year five per cent gold bonds of the Railroad Company at any time issued and outstanding under this Indenture ,and in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, the Railroad Company has granted, bargained, sold, aliened, released, conveyed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, release, convey, assign, transfer and set over unto the said Trustee and to its successor or successors in the trusts hereby created and to its and their assigns forever.

* * * * *

ARTICLE 5.

SECTION 1.

In case default shall be made in the payment of any interest of any bonds hereby secured and outstanding or in the payment of the principal of any such bonds when and as the same shall fall due respectively as herein provided, or in the due observance or performance of any other covenant or condition herein required to be observed or performed by the Railroad Company, and any such default or defaults shall continue for a period of sixty (60) days after written notice thereof to the Railroad Company from the Trustee or from the holders of fifty (50) per cent. in amount of the bonds hereby secured and then outstanding, specifying
 10
 Declaration of Default wherein such default or defaults consist then and in every such case the Trustee may, and, if so requested by the holders of fifty (50) per cent. in amount of the bonds then outstanding, shall declare a default against the Railroad Company and shall declare the principal of all of the bonds hereby secured and then outstanding to be due and payable forthwith; and upon such declaration the same shall become due and payable forthwith, anything in this Indenture or in the said bonds to the contrary notwithstanding.
 20

* * * * *

SECTION 3.

The principal of the bonds secured hereby having become due, by declaration or by maturity, the Trustee in its discretion may, after entry, or without entry, and shall, if so requested in writing by the holders of fifty (50) per cent. in amount of the bonds then outstanding and unpaid, proceed to
 30
 Sale by Trustee sell at public auction in one lot unto the highest and best bidder all and singular the property then subject to the lien of these pres-

ents, but any such sale shall be made either in the City of Philadelphia, Pennsylvania, or in the City of Atlantic City, New Jersey, and at such time and upon such terms as the Trustee may prescribe; or the Trustee may proceed to protect and enforce its rights and the rights of the bondholders hereunder by application to any court of competent jurisdiction

- Receiver
10 the property subject to this Indenture, and upon such application being made, the Railroad Company will forthwith join therein, and upon the appointment of such Receiver, will transfer and deliver to such Receiver all such property in its possession; or the Trustee may proceed to protect and enforce such rights by suit or suits in equity or at law whether for the specific performance of
- Suits by Trustee
20 or for any foreclosure hereunder or for the enforcement of any other appropriate legal or equitable remedy, as the Trustee shall deem most effectual.

* * * * *

ARTICLE 6.

SECTION 2.

- No holder of any bond or coupon hereby secured shall have any right to institute any suit or proceeding, in equity or at law, for the foreclosure of this Indenture or for the enforcement of
- 30 Right of Bond Holder to Foreclose any right or remedy hereunder unless the holders of fifty (50) per cent. in amount of the bonds hereby secured then outstanding shall theretofore have made written request to the Trustee, and shall have afforded it a reasonable opportunity, to exercise the powers hereinbefore granted to it, nor unless also they shall have there-

tofore offered to the Trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred therein.

IN WITNESS WHEREOF the said parties hereunto have caused their corporate seals to be affixed to an original and duplicate hereof, attested by their respective secretaries and have caused these presents to be signed by their respective presidents the day and year first above written.

ATLANTIC CITY AND SHORE RAILROAD CO. 10

By GEO. H. B. MARTIN,
President.

corporate
Seal
Atlantic City
&
Shore Railroad
Company

Attest:

A. H. MELTON, 20
Secretary.

GIRARD TRUST COMPANY,
Trustee.

By E. B. MORRIS,
President.

Corporate
Seal
Girard
Trust Company

Attest:

E. S. PAGE, 30
Secretary.

MOTION.

ATLANTIC COUNTY CIRCUIT COURT.

	LAWRENCE B. LEVY,		
	<i>Plaintiff,</i>	}	
10	v.		Action at Law.
	ATLANTIC CITY AND SHORE	}	Motion.
	RAILROAD Co.,		
	<i>Defendant.</i>		

20 Motion was made for judgment in favor of defendant, Atlantic City and Shore Railroad Co., coincident with the argument hereof, by Bourgeois & Coulomb, attorney of defendant, on the twelfth day of November, 1925.

Motion was made for judgment in favor of plaintiff, Lawrence B. Levy, coincident with the argument hereof, by Cole & Cole, attorney of plaintiff, on the twelfth day of November, 1925.

Plaintiff's motion for judgment was on the twenty-third day of April, 1926, granted, and an exception thereto allowed to defendant.

30 The motion for judgment in favor of the defendant was on the twenty-third day of April, 1926, denied, and exception allowed to defendant.

THEO. W. SCHIMPF,
Judge.

Dated November 12th, 1925.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

January Term, 1926.

16793	10 LAURENCE B. LEVY,	}	Action at Law.
	<i>Plaintiff,</i>		Judgment.
	v.		Cole & Cole, Attys.
	ATLANTIC CITY AND SHORE RAILROAD Co.,	}	
	<i>Defendant.</i>		

Judgment entered April 27, 1926, at 9 A. M.

20	Damages	\$4750.00
	Interest	1678.27
	Costs	47.72
		<hr/>
	Total	\$6475.99

This action was tried before Judge Theo. W. Schimpf, without a jury on April 23rd, 1926.

The cause having been heard on certain stipulated facts, and the argument of respective counsel.

IT IS ORDERED that the plaintiff, Laurence B. Levy, recover of the defendant, Atlantic City & Shore Railroad Co., the sum of Four thousand seven hundred and fifty dollars damages, One thousand six hundred seventy-eight dollars and twenty-seven cents interest, and Forty-seven dollars and seventy-two cents, costs of suit.

WM. A. BLAIR,
Clerk.

County Circuit Judgment Book No. 14, page 407.

NOTICE OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

LAURENCE B. LEVY, <i>Plaintiff,</i>	}	Action at Law. Notice of Appeal.	10
v.			
ATLANTIC CITY AND SHORE RAILROAD Co., <i>Defendant.</i>			

To Cole & Cole, Esqs., Attorneys of Plaintiff:

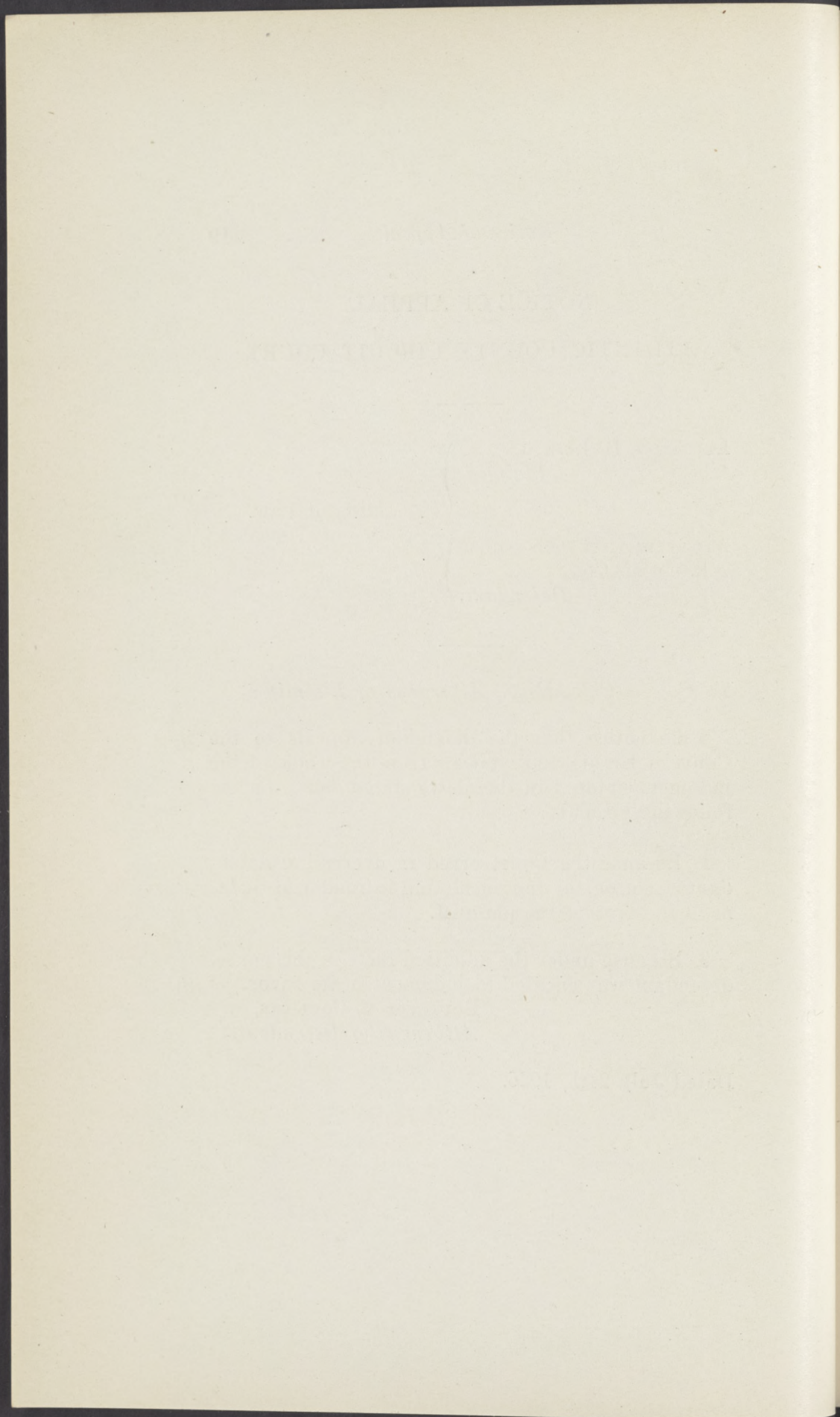
Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above-stated cause, on the following grounds:

1. Because the Court erred in overruling defendant's motion for judgment, and in rendering judgment in favor of the plaintiff.

2. Because under the admitted facts in this cause, defendant was entitled to judgment in its favor.

BOURGEOIS & COULOMB,
Attorneys of Defendant. 30

Dated July 24th, 1926.



NEW JERSEY COURT OF ERRORS AND
APPEALS.

LAURENCE B. LEVY,
Plaintiff-Appellee,

v.

ATLANTIC CITY & SHORE RAILROAD COMPANY,
Defendant-Appellant.

ON APPEAL FROM ATLANTIC COUNTY, CIRCUIT.

BRIEF OF APPELLANT.

STATEMENT.

There is but a single point involved in this suit, to wit: whether or not the owner of a bond and interest coupons secured by a trust mortgage, in which interest on the bond is due and unpaid but no foreclosure proceedings have been instituted, and 50 per cent. of the holders of the bonds have not requested a foreclosure, can recover judgment on such coupons for the unpaid interest in a suit at law.

The mortgage contained the following pertinent provisions (p. 12, l. 30.):

“NOW, THEREFORE, THIS INDENTURE
WITNESSETH, * * * in consideration of the

premises and of the purchase and acceptance of such bonds by the holders thereof, the Railroad Company has granted, bargained, sold, aliened, released, conveyed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, release, convey, assign, transfer and set over unto the said Trustee and to its successor or successors in the trusts, &c."

Article 5, Section 1, provides (p. 13, l. 1):

"In case default shall be made in the payment of any interest of any bonds hereby secured and outstanding or in the payment of the principal of any such bonds when and as the same shall fall due respectively as herein provided, or in the due observance or performance of any other covenant or condition herein required to be observed or performed by the Railroad Company, and any such default or defaults shall continue for a period of sixty (60) days after written notice thereof to the Railroad Company from the Trustee or from the holders of fifty (50) per cent. in amount of the bonds hereby secured and then outstanding, specifying wherein such default or defaults consist then and in every such case the Trustees may, and, if so requested by the holders of fifty (50) per cent. in amount of the bonds then outstanding, shall declare a default against the Railroad Company, and shall declare the principal of all of the bonds hereby secured and then outstanding to be due and payable forthwith; and upon such declaration the same shall become due and payable forthwith, anything in this Indenture or in the said bonds to the contrary notwithstanding."

Section 3 of the said Article provides (p. 13, l. 30):

“The principle of the bonds secured hereby having become due, by declaration or by maturity, the Trustee in its discretion, may, after entry, or without entry, and shall, if so requested in writing by the holders of fifty (50) per cent. in amount of the bonds then outstanding and unpaid, proceed to sell at public auction, &c.”

Section 2 of Article 6 of said mortgage provides (p. 14, l. 25):

“No holder of any bond or coupon hereby secured shall have any right to institute any suit or proceeding, in equity or at law, for the foreclosure of this Indenture or for the enforcement of any right or remedy hereunder unless the holders of fifty (50) per cent. in amount of the bonds hereby secured then outstanding shall theretofore have made written request to the Trustee, and shall have afforded it a reasonable opportunity to exercise the powers hereinbefore granted to it, nor unless also they shall have theretofore offered to the Trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred therein.”

No demand by the owners of 50 per cent. of the outstanding bonds was made upon the Trustee to institute foreclosure proceedings against the Company and no such proceedings were instituted by the trustee. The coupon attached to the bond is in the following language:

“Atlantic City & Shore Railroad Company will pay to the bearer at the office of Girard

Trust Company in the City of Philadelphia, Pennsylvania, on the first day of * * * \$25.00 in gold coin of the United States of America of the 1905 standard of weight and fineness, being the semi-annual interest upon its first mortgage five per cent. gold coupon bond No.

.....
Treasurer."

Suit was instituted by plaintiff-appellee to recover interest on ten bonds owned by him, amounting to \$4750, for which amount the Court gave judgment, together with interest on the unpaid interest, amounting to \$1678.27, for which amount judgment was entered, together with costs, and from which judgment this appeal is taken.

On the 1st of December, 1905, the Atlantic City & Shore Railroad Company, defendant-appellant, executed its bonds in the amount of \$950,000, with interest coupons thereto attached, secured by a mortgage on its property, executed to the Girard Trust Company, of Philadelphia, as trustee. Plaintiff-appellee became the owner of ten bonds of \$1,000 each, with interest coupons thereto attached. Default was made in the payment of the interest on said bonds.

The mortgage contained a provision for the foreclosure of the mortgage in the event of default either in the payment of the principal or interest. Section 2 of Article 6 of said mortgage is, in the following language (p. 14, l. 25):

"No holder of any bond or coupon hereby secured shall have any right to institute any suit or proceeding, in equity or at law, for the foreclosure of this indenture or for the enforcement of any right or remedy hereunder

unless the holders of fifty (50) per cent. in amount of the bonds hereby secured then outstanding shall theretofore have made, written request to the trustee, &c.”

No proceedings in foreclosure were instituted, and no demand by the owners, of 50 per cent. of the outstanding bonds was made upon the trustee to institute such proceedings. Plaintiff, being the owner of the bonds and the coupons, instituted his suit at law to recover the moneys due for interest.

The third paragraph of the complaint (p. 2, l. 1), is in the following language:

“3. Accompanying each bond and attached to and made a part thereof were certain coupons.”

The answer (p. 4, l. 10) admits the allegation in that paragraph.

It is submitted that the Judge erred in giving judgment for plaintiff, and that same should be set aside.

ARGUMENT.

It is contended that said judgment is erroneous in three respects:

1. It is contrary to the Act of March 23rd, 1881, providing for the foreclosure of a mortgage before judgment can be entered upon the bond.

2. It is contrary to an agreement in the mortgage binding on the appellee bond-holder and appellant

mortgagor that no proceedings will be taken to collect the interest; except as provided in the mortgage.

3. That the amount sued for was interest on the outstanding mortgage, and plaintiff-appellee is not entitled to have interest on the interest.

I.

IT IS CONTRARY TO THE ACT OF MARCH 23RD, 1881, PROVIDING FOR THE FORECLOSURE OF A MORTGAGE BEFORE JUDGMENT CAN BE ENTERED UPON THE BOND.

The language of the statute is as follows:

“That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage, and if, at the sale of the mortgaged premises under said foreclosure proceedings, the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within six months, &c.”

It will be observed that the statute covers the interest as well as the bond, and considers the bond and interest as one debt.

When the Act of 1881 was passed, corporate mortgages were common, and must have been known to the Legislature quite as well as individual mort-

gages, and there is no reason why the Act of 1881 should not apply to one as well as to the other. If the Legislature had intended that the Act of 1881 should not apply to corporate mortgages, it would have been a simple matter for it to have excluded them from the language of the act; but inasmuch as they used language so comprehensive that it included them, it is submitted that the Court cannot exclude them.

It is submitted that the language of the Act of March 23rd, 1881, is so clear and unambiguous as to exclude interpretation—it needs none. And the language of Justice Depue in the *Pipe Line Case* (62 L. 254), at p. 262, is quite as applicable to the rights conferred by this statute as to the rights conferred upon the Pipe Line Company, of which he was speaking. His language is as follows:

“Wherever the Legislature has given in plain terms that which the company has the capacity to take, the Court is not justified in flitting away the legislative grant by denying the legal effect of the words of technical signification contained in it, when on a reasonable construction there is nothing in the subject-matter or context which would prevent the grant so construed from taking effect.”

In the case at hand, why should not this corporation, having dealt with its bondholders, relying upon the security of the Act of March 23rd, 1881, now have the benefit of it?

The case of *Holmes v. Seashore Railway Co.*, (57 N. J. L. 16), in the Supreme Court, is directly in point. In that case, Mr. Justice VanSyckel, speaking for the Court said (p. 17):

“The statute is comprehensive—it in terms

applies to all cases. It is imperative that all proceedings to collect the debt shall be first, to foreclose the mortgage, securing it, and the further provision that it shall be lawful to proceed on the bond for the deficiency after the sale of the mortgaged premises, by clear implication excludes the right to sue upon the bond before foreclosure."

Appellee endeavors to distinguish that case from the present case upon the ground that the principal debt was due in the Holmes case, whereas the principal debt is not due in the case at hand. It is submitted that there are two conclusive answers to this contention: The first is, the statute makes no distinction between cases where the foreclosure is instituted because the principal debt is due, and those cases where the foreclosure is because interest is unpaid. The second is, that by the terms of the mortgage in the case at hand, if demand is made upon the trustee for foreclosure by the holders of 50 per cent. of the outstanding bonds, the trustee is obliged to declare the principal debt due, and proceed to foreclose, and plaintiff, by purchasing said bonds, assented to and became bound by that provision.

In the Holmes case, the principal debt became due only by reason of default in the payment of the interest.

If the applicability of the statute to corporate mortgages is determined by the ability of the bondholder to foreclose the mortgage, at his will, in case of the non-payment of interest, as was stated in the case of *Reinhardt Interstate Telephone*, 71 E. 70, then we might have this situation: A corporate mortgage to a trustee, where all of the bonds were

held by a single bondholder. In that event, the bondholder, being in a position where he could compel the foreclosure of the mortgage at his option, in the event of default of interest, the mortgage would fall within the scope of the Act of 1881. Or, if this single bondholder should sell one-third of his bonds and retain the other two-thirds, so that he were able to direct the trustee to foreclose, at his option, it would still remain within the Act of 1881. But, if he should sell two-thirds of his bonds, then the same mortgage would immediately be placed, according to the Vice-Chancellor's theory, beyond the Act of 1881. And if, later, the bondholder should purchase back enough of the bonds to give him more than 50 per cent. of the outstanding bonds, the foreclosure would again be within his option, and the mortgage would again be within the scope of the act. The Legislature could never have intended such a criterion to determine the application of its act; and, if such is the criterion, if the holder of all the bonds desired to harass and oppress the corporation, he could sell bonds to one hundred or five hundred different holders, if there were so many bonds issued, and, in the event of a default of interest, these five hundred bondholders could each institute a suit against the company for unpaid interest, and the Act of 1881 would be no protection to it.

In the case of *Knight v. Cape May Sand Co.* (83 L. 597), at p. 601, this Court said:

“The statute was enacted to counteract the prevailing evil which then existed, and which was very oppressive to mortgage debtors. * * * Before the passage of the act, the mortgagee could foreclose the mortgage and bring his action on the bond at the same time, if he saw

fit, and thus harass the mortgage debtor and put him to needless expense and costs. It was at such oppressive proceedings that the statute was aimed. It would follow, therefore, that in order to effectuate the policy of the law, the strictness and construction required to be given to the statute should be within the bounds of a liberal sense, and not an illiberal one."

It is submitted that there is nothing in the Act of 1881 which suggests any such vacillating policy upon the part of the Legislature. In fact, if the Act of 1881 does represent a legislative policy, it must, while it remains upon the statute book, be applicable to all cases within its purview.

In the case of *Reinhardt v. Interstate Telephone*, (71 Eq. 70), the Court of Chancery, by Vice-Chancellor Pitney placed a construction upon the Act of 1881 which would render it inapplicable to corporation mortgages, and which would nullify the case of *Holmes v. Seashore Railway Co.*, among other things saying:

"In order to bring the case within the prohibitory statute, the mortgage must be one which the holder of the bond can foreclose at his option, for the act declares that, in all cases where a bond and mortgage had been or might thereafter be given for the same debt, &c."

However, the Vice-Chancellor does qualify his conclusions in this language (p. 72):

"I say 'apparently,' for unless the verbiage of the bond and mortgage there involved is the same as that here involved, it may not be in point."

However, what the Vice-Chancellor said, touching

the matter in that case was obiter, as clearly appears from his language on p. 74, where he says:

“But be that as it may, the question here is not whether the complainant can lawfully bring an action at law upon his coupons (which are in the ordinary form of a simple promise to pay the bearer on the 1st day of January, 1906, at the office of the Trenton Trust and Safe Deposit Company, of Trenton, N. J. \$25 in gold coin, being six months' interest on its mortgage bond numbered * * * , and signed by the treasurer), but the question is whether the complainant is a creditor of the defendant.”

That the language of the Act of 1881 is as applicable to corporate mortgages as it is to individual mortgages, is apparent. The first clause of the act reads:

“That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage.”

The reason for the enactment of this legislation was to prevent a mortgagee from entering a judgment upon the bond prior to the foreclosure of the mortgage, and thus having a mortgage lien and a judgment lien against the mortgagor's property both outstanding at the same time, and the language of the Act of 1881 was such as to include the interest as a part of the bond. So that, neither the bond nor the interest accruing on the bond could be reduced to a judgment so long as the mortgagee held the mortgage lien against the mortgagor's property. The fact that the trust mortgage is given to secure more than one bond does not change or alter

the applicability of the Act of 1881 any more than would the giving of two concurrent bonds secured by an individual mortgage enable the mortgagee to evade the act, because the mortgage was given to secure two bonds instead of one; nor does the fact that the bonds secured by a corporation mortgage may have a coupon or coupons thereto annexed change the situation. The coupons are only evidence of an interest indebtedness—they inform the holder of them that at a certain time there will be payable a certain sum of money as interest due on a mortgage mentioned therein. The person is bound to know the law, and when he takes the bond and coupons reciting the mortgage, he must realize that the payment of the interest is governed by the contract therein contained, and the law pertaining to the mortgage.

Plaintiff cites the case of *Fidelity v. Wilkes-Barre* (98 L. 507) as justification for the judgment in this case. It is submitted, however, that that case is not an authority for the present case, because in that case, as will appear from the Court's opinion (p. 509:

“The detached coupon being separate and distinct obligations, negotiable in character, &c.”

In the present case there is no allegation that the coupons are detached, and the pleadings show them to be not detached.

The concluding clause of the act is:

“And if at the sale of the mortgaged premises under the foreclosure proceedings, &c. judgment may be entered for the deficiency.”

It is submitted that that clause is just as applicable to a corporation mortgage as it is to an individual mortgage. In the event that the mortgaged property should sell for less than the mortgage debt, there is no reason why the trustee, in behalf of the bondholders, or, if he refuse, then an individual bondholder in the trustee's name, could not proceed to the entry of judgment for the deficiency.

The rights of the parties are determined at the time the contract between them is entered into. In the case of *Van Aiken v. Tice* (60 L. 377), the Court said:

“The time of the giving of the securities for the same debt is the test made by the statute, not the time of bring suit or of obtaining judgment thereon.”

II.

IT IS CONTRARY TO AN AGREEMENT IN THE MORTGAGE BINDING ON THE APPELLEE BONDHOLDER AND APPELLANT MORTGAGOR THAT NO PROCEEDINGS WILL BE TAKEN TO COLLECT THE INTEREST; EXCEPT AS PROVIDED IN THE MORTGAGE.

As to the second reason, the bond and coupon both refer to the mortgage—the bond in the following language:

“Reference is hereby made to said indenture (of mortgage), for a statement of the nature and extent of the security, the right of the holders of the bonds under the same, and the terms and conditions upon which the said bonds are issued and secured.”

So that, when the bondholder became the purchaser or owner of such bond and accepted it, the terms of the mortgage became a part of his contract. The mortgage contained the following provisions bearing upon this subject:

“Section 1, Article 5: In case default shall be made in the payment of any interest on any bond hereby secured or outstanding, or in the payment of the principal of any such bonds when and as the same shall fall due, respectively as herein provided, or in the due, observance or performance of any other covenants or conditions herein required to be observed or performed by the Railroad Company * * * The trustee may, and if so requested by the holders of 50 per cent. in amount of the bonds then outstanding, shall declare the principal of all the bonds hereby secured and then outstanding to be due and payable forthwith.”

Section 3 of said article provides:

“The principal of the bonds secured hereby, having become due by declaration or by maturity, the trustee, in its discretion, may after entry or without entry, and shall if requested in writing by the holders of 50 per cent. in amount of the bonds then outstanding and unpaid, proceed to sell at auction, &c.”

So that, plaintiff, as a bondholder, entered into an agreement with the mortgagor by which, in the event of a default in the payment of the interest or **of the principal**, the trustee should have the right to proceed to foreclose said mortgage, and in the event that the owners of 50 per cent. of the outstanding bonds so requested, the trustee would be obliged

to proceed to foreclose said mortgage. The unanswerable inference to be drawn from the language of that contract is that unless the trustee would proceed of his own initiative to cause a foreclosure, there should be no foreclosure at the instance of a bondholder or holders, unless the holders of 50 per cent. of the bonds outstanding so requested it.

Section 2, of Article 6, of said mortgage provides:

“No holder of any bond or coupon hereby secured shall have any right to institute any suit or proceeding in equity or at law for the foreclosure of this indenture, or for the enforcement of any right or remedy hereunder unless the holders of 50 per cent. in amount of the bonds hereby secured then outstanding shall theretofore have made written request to the trustee, and shall have afforded it a reasonable opportunity to exercise the powers hereinbefore granted to it; nor unless, also, they shall have theretofore offered to the trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred therein.”

The question of over-due interest and its collection certainly, so long as the coupon is attached to the mortgage, is covered by the clause in the above paragraph, which reads as follows:

“For the enforcement of any right or remedy hereunder.”

Hence, the plaintiff could not, without violating his contract with the defendant, institute or prosecute this suit, and the Court, with all the facts before it, erred in giving judgment for plaintiff, but an appropriate judgment should have been rendered for defendant.

III.

THAT THE AMOUNT SUED FOR WAS INTEREST ON THE OUTSTANDING MORTGAGE AND PLAINTIFF-APPELLEE IS NOT ENTITLED TO HAVE INTEREST ON THE INTEREST.

The bondholder, being the owner of the bond and coupon, is not entitled to have interest upon his interest, any more than an individual mortgagee is entitled to have interest upon his interest, if it is not promptly paid.

It is, therefore, submitted that the trial Judge erred in awarding judgment to the plaintiff, and that it should be reversed, and judgment entered for defendant.

Respectfully submitted,

BOURGEOIS & COULOMB,

Attorneys for Appellant.

91

New Jersey Court of Errors and Appeals

LAURENCE B. LEVY,
Plaintiff-Respondent,

v.

ATLANTIC CITY & SHORE RAILROAD COMPANY,
Defendant-Appellant.

ON APPEAL FROM ATLANTIC CIRCUIT.

BRIEF FOR RESPONDENT.

STATEMENT.

Appellant issued and sold its coupon bonds to the amount of approximately \$950,000. These bonds were attempted to be secured by a trust mortgage dated December 1, 1905, for which the Girard Trust Company of Pennsylvania was named as trustee. Respondent bought ten of the bonds, each in the sum of \$1,000.00 to which there was attached coupons in the usual form payable every six months from the first day of December, 1905. These coupons were paid to a certain date and thereafter there was a default. This action was to recover on 190 coupons at \$25 each. No fact being in dispute, the case was stipulated and heard by Judge Schimpf, with-

out a jury, who rendered a verdict for the respondent for the full amount claimed, with interest. From the judgment thereon, the appeal was taken. The single point involved is whether the Bond and Mortgage Act of 1881, Compiled Statutes, section 48, page 3421, paragraph 48, applies.

By the terms of the mortgage, only the trustee could file a bill to foreclose and then only upon the request of a certain percentage of the bondholders. Respondent was not the owner of a sufficient number of bonds to permit him to demand that the trustee foreclose,

ARGUMENT.

THE BOND AND MORTGAGE ACT OF 1881
IS WITHOUT APPLICATION.

The Act in question came under consideration in *Holmes v. The Seashore, &c.*, 57 law, page 16. The Act was held to apply. But in that case the whole principal debt became due with the right to demand foreclosure of the mortgage upon default in payment of the interest coupons for a period of ninety days after the due date. The Court said:

“By the terms of the bonds, upon failure to pay the interest coupons for the period of ninety days after the due date, the principal became due. The ninety days had elapsed before this suit was commenced.”

We may concede that upon the facts of that case it was correctly decided.

But numerous decisions since are to the effect that the statute has no application where the suit is

brought to recover upon the coupons detached from the bonds and where the holder of the coupons has no right to foreclose.

Vice-Chancellor Pitney gives a luminous discussion of the statute in *Reinhardt v. Interstate Telephone Company*, 71 Equity 70, in which he cites the Holmes-Seashore case and clearly marks the distinction between the cases. By all the cases, this statute is in derogation of the common law and must be construed strictly. *Crater v. Smith*, 42 Equity 348, was affirmed in 43 Equity 636. The question involved seems to be wholly at rest in this court in the rather recent case of *Fidelity &c. v. Wilkesbarre &c.*, 98 Law, page 507, in which preceding cases are cited with approval.

When the date for the payment of the respective coupons arrived, and they were not paid, there was immediately created an indebtedness which the appellant was required to pay. Respondent could not proceed to foreclose the mortgage, as required by the Act, for the reason that the mortgage was not made to him, he was no party to it and he was in no position to call upon the trustee to foreclose. In the case last cited this Court said:

“The detached coupons being separate and distinct obligations, negotiable in character, it becomes obvious that the provisions contained in the trust mortgage relative to the enforcement of the same, or the subsidiary or collateral agreements of other bondholders, is in no way identified with the payment of plaintiff’s obligation, can have no bearing in the liability of the defendant, as to that distinct obligation.”

Vice-Chancellor Berry, in *Lovett v. Leslér*, Volume 4, #8, New Jersey Advance Reports, 132 At-

lantic Reporter, page 77, cites the cases upon the subject and says:

“All of these cases are based on the idea that the detached coupon forms a separate and distinct negotiable obligation, and is free from all conditions and limitations contained in the bond itself.”

In *Fidelity v. Wilkesbarre* this Court cites with approval *Mack v. American &c.*, 79 Law 109. In that case, as here, the suit upon the coupons was by the bondholder. In that case, as here, there were provisions in the trust mortgage touching the right to foreclose and to collect the amount due on the bond, which provisions were not followed. The case holds that:

“The bond and the coupons are not parts of one debt—they are separate debts, they may be held by different persons and suit on the one does not bar suit on the other.”

It follows from the cases that any holder of the detached coupon may institute suit at law to recover the amount due thereon regardless of any provision in the mortgage or bond touching the foreclosure of the mortgage or the collection of the debt.

Independent of the decisions, it is obvious that the statute can have no application and for the reasons so well presented by Vice-Chancellor Pitney in the cited case. Moreover, there is no language in the mortgage or bond which attempts to preclude the right to institute a suit at law upon the coupons. Doubtless the brief for appellant will set forth the provisions upon which reliance is had to defeat the pending action. A careful reading of the provisions

will disclose that they are limited to the question of foreclosure and other remedies named in the instrument itself such as the right to appoint a receiver and trustee to take possession, &c. There is no language which warrants the conclusion that no right shall exist to sue to recover judgment at law upon the detached coupons. It would be highly unjust and inequitable to place the holder of the bond in any such position; nothing short of the clearest and most unqualified language should force such a result.

There was no error and the judgment should be affirmed.

Respectfully submitted,
COLE & COLE,
Solicitors for Respondent.
C. L. COLE,
Of Counsel.

