NEW JERSEY

Court of Error and Appeals.

BETWEEN GUSTAV W. LEMBECK, *Complainant,* *and* JARVIS TERMINAL COLD STORAGE COMPANY, *Defendant.*	*On Appeal.* *On Petition of Nathalie Jarvis and of Erie Railroad Company.*

Brief of William Brinkerhoff on Behalf of Appellee, The Commercial Trust Company of New Jersey.

The object of this memorandum is solely to answer the contention of the Erie Railroad Company respecting claims of the Commercial Trust Company of New Jersey, as set forth on page 20 of the brief of Messrs. Collins and Corbin.

The provisions of the trust mortgage affecting this subject are found in Volume II., page 190, line 10, and are as follows:

> "The Storage Company agrees, from time "to time, on demand, to pay to the "Trustee, reasonable compensation for "its services hereunder; also to make "re-imbursement to the Trustee for all "counsel fees, compensation of attor- "neys and agents, and other expendi-

"tures made by the Trustee hereunder,
"with interest thereon; also to indem-
"nify and save the Trustee harmless
"against any and all liabilities of any
"kind which the Trustee may incur in
"the exercise and performance of its
"powers and duties hereunder, including
"any penalty or liability suffered by the
"Trustee under this instrument; and
"for such indemnification, re-imburse-
"ment and payment of Trustee's com-
"pensation a first lien is hereby imposed
"in favor of the Trustee upon all the
"property and funds hereby conveyed
"in trust.

"It shall be no part of the duty of the Trus-
"tee to see to the insurance of any part
"of the property hereby conveyed in
"trust, or itself to effect such insurance,
"but it may do so."

On page 21 of the said brief it is asserted that the claim of the Trust Company on account of fire insurance premiums which it had paid in the discharge of its duties as Trustee should not be established as a lien under the trust mortgage because there was "no obligation on the part of the Trustee to obtain such insurance." This statement is a misleading half truth and is sufficiently answered by reference to the mortgage provision quoted above, which expressly declares that, although it shall be no part of the Trustee's duty to effect insurance "it may do so," (Vol. II., page 190, line 29).

It appearing thus that the Trusstee was authorized to effect the insurance it of course follows that it is protected in making such payments by the mortgage provision herein above quoted. It is further to be noted in this connection that this insurance was placed at the particular request of the bondholders (see testimoney, Vol. II., page 96, line 26). It appears further by the testimony in Vol. II., page 97, line 23, et seq., that when the receivers sold the mortgaged property, the purchasers paid them six hundred and forty dollars and twenty-six cents as the amount of the aforesaid premium still unearned, and that this amount is now in court awaiting distribution. It certainly would be unfair to award it to any one except the Trustee who paid it.

The certifying of the bonds was clearly a duty performed in pursuance of the trust, and the Trusttee's compensation for rendering this service, as well as other services, is protected by lien by the clause before quoted.

The same answer applies to the bill for legal services rendered to the Trustee. The clause quoted makes it perfectly clear that these obligations are to be a lien.

The conditions under which these various obligations were incurred are all fully explained in the testimony contained in pages 96, 97, 98, 99 and 100, in Vol. II.

It is submitted that the final decree of the Court of Chancery respecting these payments should be affirmed.

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New Jersey Court of Errors and Appeals.

Between GUSTAVE W. LEMBECK, Plaintiff, AND JARVIS TERMINAL COLD STORAGE COMPANY, Defendant.	On Appeals of Nathalie Jarvis and Erie Railroad Company.

BRIEF OF RESPONDENTS YOUNG AND IRVIN IN REPLY TO BRIEFS OF APPELLANTS NATHALIE JARVIS AND ERIE RAILROAD COMPANY.

The Court will recall that when these appeals were reached for argument, the appellants were not prepared to proceed. The Court thereupon permitted the respondents to file their brief and allowed the appellants 20 days in which to file their briefs. The Court also gave permission to the respondents to file a reply brief within 20 days thereafter, if they so desired. This brief is filed as a reply to the brief of the appellant. We think the original brief of the respondents is in general a sufficient statement of their claim, and we will in this brief merely reply very briefly to a few matters contained in the briefs of the appellants.

Reply to Brief of Appellant Nathalie Jarvis.

At the top of page 8 of the brief in behalf of appellant Nathalie Jarvis, her position is stated as follows :

> " The proposition in brief is that the Company was under the obligation to deliver to her seven bonds for which it had received full consideration," etc.

We claim that the Company was under no obligation to Mrs. Jarvis to deliver the seven bonds referred to. As pointed out in our original brief, the executive committee of the Jarvis Terminal Cold Storage Company, on February 19th, 1903, passed a resolution authorizing the officers of the Company to execute a note in favor of Mrs. Jarvis for $7,000, to be secured by seventy shares of the capital stock of the Company, the note and the security to be delivered upon receiving from Mrs. Jarvis a satisfaction piece of the mortgage held by her (see page 22, Volume 2). This note, secured by the stock as collateral, was the only obligation of the Company to Mrs. Jarvis. If Mr. Jarvis had made any different promises, Mr. Schafer, the agent for Mrs. Jarvis, should have declined to accept the note or to deliver the satisfaction piece. If false representations were made at the time the note was delivered, Mrs. Jarvis may have a cause of action against Mr. Jarvis for fraud, but no corporate obligation exists aside from that created by this resolution ; and the Company had, eight days before this resolution was passed by its board of directors, approved the trust mortgage and the plan for using the bonds, thereby depriving itself of any power to incur the obligation which Mrs. Jarvis alleges.

The brief submitted in behalf of Mrs. Jarvis continues : " that on December 22nd, 1903, a condition had been complied with which gave the Company the right to increase its mortgage lien as against all parties before the Court." That is true, but the right to increase its lien was only for one specific purpose—namely, to pay for property acquired in addition to that for which proceeds of the first one hundred and twenty-five bonds were to be devoted—and had the Company given Mrs. Jarvis seven of those bonds in satisfaction of an alleged lien existing against the land at the time the other bonds were issued it would have been a fraud against the other bondholders who had taken their bonds upon the supposition that the property was free and clear of all liens.

On page 8, at line 19, the brief states:

> "The twenty-five extension bonds were never lawfully disposed of by the Jarvis Company and are to be regarded as though actually remaining in the treasury of the Company, and subject to the Nathalie Jarvis equity."

This position is quite different from that taken by Mrs. Jarvis in her petition (page 15, Volume 2, line 29). She there alleged that *twenty* bonds remained undisposed of and in the treasury of the Company, practically conceding that one hundred and thirty bonds were lawfully issued. In fact, during the entire brief, there is no discussion of the lien of the five bonds which were delivered to the representative of the Crane Company. These bonds, as shown in our principal brief, were taken in part satisfaction of a valid claim for $8,000 against the Jarvis Company for materials used in construction of the plant.

On page 15 of the brief, at line 22, it is stated:

> "Under these circumstances we submit that the Mortgage Company has no right to retain the bonds, but that the same are to be considered as though in the treasury of the Company."

It is not necessary to decide whether the Mortgage Company had the right to these bonds or not. Ownership by the appellants of one hundred and thirty of the bonds entitles them to the money on deposit with the Clerk. The respondents claim that either these bonds were never issued and are still in the treasury of the Company, or that they, the respondents, have better title to them than anybody else if they were issued. What they object to is the theory that a decree can now be made which, in effect, permits them to be issued for an improper purpose to a person not entitled to them. At the time the respondents undertook the reorganization of the Jarvis Company these bonds were actually physically issued. They bore the stamp of the trustee certifying that they had been properly issued, and they were in the hands of a trust company which claimed to be the *bona fide* holder thereof. Under these circumstances it was necessary, before the Jarvis Company's affairs could be adjusted, that these bonds be procured and deposited with the Receivers to be canceled. The respondents brought this about and were obliged to drive a hard bargain with the trust company before they could procure them. If anyone is to be considered the owner of them, the respondents claim that their title is better than that of anyone else.

On page 21 of the brief, at line 18, the argument is made that, as the Mortgage Company voluntarily submitted its claim to the Receivers, it might be bound by the adjudication of the Receivers that the bonds were validly issued. With the same force it may be urged that a claim of Mrs. Jarvis, not the one now presented, but the one she swore at that time was a true claim, had been presented to the Receivers and adjudicated by them. Permit us to urge again that it is not necessary for the Court to determine whether the claim of the Mortgage and Trust Company was good. Let us concede that any defense which the Jarvis Company could make against these bonds in the hands of the Mortgage and Trust Company can be made against the respondents. We are perfectly satisfied to have the Court decide that these bonds were never lawfully issued and that they should be restored to the Company as if never issued. Ownership of them is not at all necessary to entitle us to the fund in dispute. Let us again urge, however, that it is our money and our labor which has brought those bonds into Court; that that money was expended and that labor performed in entire ignorance of this claim of Mrs. Jarvis' and that before we undertook the labor or expended the money she had, in the most solemn way, and under oath, given us every reason to believe that she had no claim except that of a creditor upon a note secured by stock. In several places in the brief it is urged that we had notice of the claim of Mrs. Jarvis, because of the fact that she denied the validity of our claim, except to the extent of $110,000. We did have notice that she had a claim, but the claim of which we had notice was one based upon an allegation of false representations made to her regarding the solvency of the Company and the worth of its stock. She declared

> "said representations were untrue and were made in order to induce me to cancel the said purchase money mortgage and forego the security thereof" (see proof of claim, page 205, Vol. 2).

We admit notice of this claim, and we knew that it was a claim which did not entitle her to be a preferred creditor. Mrs. Jarvis' position is really that of a person attempting to assert that an unrecorded mortgage is prior to one duly recorded against persons without notice. Her position entitles her to sympathy, for it is apparent that her interests were not properly protected by Schafer, the New York banker who was her business agent, but she is not the first person who has suffered from the incompetency or neglect of agents, and when has it yet been held that the principal can relieve himself of the consequences of the incompetence and neglect of his agent and shift the burden to the shoulders of those who are without fault and who have been diligent ?

The case of *Central Railroad Company vs. McCartney*, 39 Vroom, 165, wherein Mr. Justice PITNEY collects the authorities in New Jersey dealing with estoppel, is cited on page 24. The facts bring this case strictly within the rule therein stated.

1. Mrs. Jarvis, against whom the estoppel is urged, has on previous occasions, by words or conduct, made representations and concealments of material facts inconsistent with the facts forming the basis of this present claim. These representations and concealments have been sufficiently referred to.

2. She either knew the facts to be otherwise than as represented, or except for gross negligence would have known, or she pretended to know the facts when she knew that she did not know them. Of course, this is not literally true of Mrs. Jarvis personally, but knowledge possessed by Schafer, her agent, must be imputed to her, and he must have known that the facts to which he permitted Mrs. Jarvis to make oath were untrue, or else he was grossly negligent.

3. The representations and concealments were made under such circumstances that a reasonably prudent man would believe that they were intended to be acted upon as true. The filing of a satisfaction of her mortgage, the taking of renewal after renewal of the promissory note reciting that it was secured by certain collateral, and the subsequent filing of a sworn claim before Receivers was certainly conduct that a reasonably prudent man might act upon as truthfully representing the nature of the claim of Mrs. Jarvis.

4. Messrs. Young and Irvin were ignorant of the facts, and had no convenient opportunity to ascertain them. They were chargeable beyond all doubt with

knowledge of the proceedings in this action and a search of these proceedings from beginning to end; and, more, a search of all the records of the Jarvis Terminal Cold Storage Company from the day of its organization down to the 22d day of December, 1903, would reveal no intimation of the facts which Mrs. Jarvis now seeks to maintain.

5. Messrs. Young and Irvin in good faith relied upon this representation and this conduct, and were led to believe that when they purchased the one hundred and fifty outstanding bonds of this Company they were entitled to any fund in Court upon which these bonds and the mortgage securing them constituted a lien, and they will now be substantially prejudiced if seven of these bonds are taken from them and given to another.

Counsel for Mrs. Jarvis admitted in Court that Messrs. Young and Irvin owned or controlled these bonds, and the Court recited this admission in its order (page 8, line 32, to page 9, line 35).

Reply to Brief Filed by Appellant Erie Railroad Company.

The claim of the Erie Railroad Company is simply an ingenious, and, as we believe, sophistical, attempt to make it appear that a second mortgage is in some respects superior to a first mortgage. Counsel for the Erie Railroad Company concede that their claim will be wiped out unless the Court is prepared to hold that only one hundred and twenty-five bonds were lawfully issued under the first mortgage; that they are liens only to the extent of $110,000, the amount for which they were purchased, and that the unpaid coupons attached to the bonds are not entitled to participate as a lien. Such an adjudication can only be predicated upon the section of the Mechanics' Lien Law which was quoted in our principal brief, and which appears on page 9 of the brief of counsel for the Erie Railroad. This law does not purport to interfere in any way with the priority of one mortgage over another, but does fix the facts upon which a mortgage may be prior to a mechanic's lien, and it is therefore argued that the Erie mortgage is prior to a mechanic's lien to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of a new building or alterations, repairs or additions to any building; that the mortgage to the Commercial Trust Company is prior to the liens only to the same extent, and therefore that the Erie mortgage is prior to the Commercial Trust Company mortgage except to the extent by which the Commercial Trust Company mortgage is prior to the liens. This claim was answered in our principal brief, but it may be proper to add the following considerations:

I. There is nothing in the evidence taken before the Vice-Chancellor to show that there are any valid mechanics' liens upon the property in question. Numerous liens were filed and are referred to in the testimony and exhibits, but no proof was offered tending to show the extent or validity of these liens. Omission to present such testimony was intentional on the part of the respondents. They rely upon their ownership of the first mortgage bonds, and did not wish to complicate the case by any discussion or consideration of the extent or validity of the mechanics' lien claims. Therefore, the case presents nothing which warrants a consideration of the mechanics' lien law in its determinatiou. It is solely a question between a first mortgage and a second mortgage. If the Erie Railroad had desired to prove the extent, if any, of its priority over the claims represented by the mechanics' liens it should have offered evidence upon this subject.

II. On page 10 of the brief of the Erie Railroad Company, it is contended that the statute relating to usury providing that

> "No corporation shall hereafter plead or set up the defense of usury to any action brought against it to recover damages," etc.,

permits other persons to plead usury in an attempt to invalidate corporate bonds issued below par. The cases cited upon our principal brief show that in other jurisdictions similar statutes have uniformly been construed in a contrary manner, and that the effect of such statutes is not merely to prevent the corporation from pleading usury but to make the bonds issued below par valid as against everybody. Having been validly issued they become valid for all purposes, in all hands and against all persons.

III. Although there is nothing in the case, as we have said, to show that there were any valid mechanics' liens against the property in question, we beg to repeat by way of emphasis what was said upon page 20 of our original brief, by reason of the fact that upon page 16 of the brief of the Erie Railroad Company under Point IV. it is stated :

> "There will probably be not much dispute on this point," etc.

There is a very decided dispute.

The proceeds of the Erie Railroad Company's mortgage were not "advanced and paid by the mortgagee and applied to the erection of any *new* building." The money advanced by the Erie Railroad Company was applied (1) to the payment of obligations long overdue; and (2) to the procurement of a certain agreement from the Jarvis Company. The evidence upon this point is referred to on page 21 of our principal brief.

As urged in our principal brief, therefore, the decree should be affirmed.

Pierre F. Cook,
Solicitor for Respondents Young and Irvin and Union Terminal Cold Storage Company.

Pierre F. Cook,
Alfred A. Wheat,
Of Counsel.