

fact that there was a distinct understanding between the parties as to the nature of the tenancy. Woods, Landl. & Ten. 25, 60, 61, and cases cited; and see, also, *Crommelin v. Thiess*, 31 Ala. 418. Had the defendant held over after the expiration of the five-year lease, without any agreement on the part of the plaintiffs as to the character of such holding, the defendant would have been a tenant on sufferance, the plaintiffs having a right to elect whether to resume possession or to treat the defendant as a tenant from year to year. Had the defendant held over without any agreement with the plaintiffs, and had paid, and plaintiffs had received, rent, the law would have implied a contract of lease from year to year. Had the defendant held over without any agreement with the plaintiffs, and then the writings of August 4th had been passed between the parties, I am inclined to the opinion that the law would have implied a renewal of the five-year lease; and this by fair construction of the writings themselves, otherwise unexplained.

But the case made differs from all of these hypothetical cases. By understanding of the parties the defendant held over as a tenant at will, and thereafter the minds of the contracting parties did not meet, and although rent was paid and received on the terms of the old lease, the character of defendant's holding was not changed.

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MARLOR v. TEXAS & P. RY. Co.<sup>1</sup>

(Circuit Court, S. D. New York. April 14, 1884.)

**1. MORTGAGE BONDS OF RAILROAD—RIGHT OF ACTION FOR INTEREST.**

It matters not whether the bonds of a railroad are secured by a mortgage making the interest a lien upon the lands of the company or upon its net earnings, or upon both, or whether there is no mortgage at all. If there is an agreement to pay interest and it is not paid, there is a breach of the bond for which the holder can maintain an action.

**2. SAME—IN CASE OF SCRIP TENDERED IN LIEU OF INTEREST.**

A railroad mortgage provides that in the event of a failure of net earnings sufficient to pay interest on the bonds secured by it, the company can, in its option, issue certain scrip in lieu thereof. In such a case the bondholder is not bound to accept the scrip unless the fact exists which authorizes the company to issue it, nor is the burden upon him to prove a negative. His right of action is *prima facie* perfect upon proof of non-payment of interest on the presentment of his bond at the time when and the place where the interest is made payable.

Motion to Strike out Part of Answer.

*Dos Passos Bros.*, for complainant.

*Dillon & Swayne* and *W. S. Pierce, Jr.*, for defendant.

WALLACE, J. The only questions which seem to be involved in this case are (1) whether the mortgage bonds of the defendant contain a promise for the payment of interest annually on the first day of July

<sup>1</sup>Affirmed. See 8 Sup. Ct. Rep. 311.

in each year; and (2) whether defendant has exercised its option to issue scrip for the interest, convertible into capital stock of the company, and receivable at par for the purchase of the company's land at schedule prices.

The first question is one of law, to be solved by reading the bonds and mortgage; the second is one of fact.

1. The bond, so far as is relevant to the controversy, reads as follows:

"The Texas & Pacific Railway Company hereby acknowledges itself to be indebted to ———, of ———, or assigns, in the sum of one thousand dollars, lawful money of the United States of America, which sum the said company promises to pay to the said ———, or assigns, at the office of the company in the city of New York, on the first day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent. per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned. This bond is one of a series of bonds numbered consecutively from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a first mortgage of even date herewith, duly recorded, upon certain lands heretofore granted to the Texas & Pacific Railway Company by the state of Texas. This bond has also, as security for the interest, a mortgage lien upon the net income of the said the Texas & Pacific Railway Company, derived from operating its lines of railway east of Fort Worth, in the state of Texas, after providing for the operating expenses, the current repairs, and reconstructions, and the interest upon the first and second mortgage bonds secured upon said lines of railway, and in case such net earnings shall not in any one year be sufficient to enable the company to pay seven per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest; such scrip to be received at par and interest, the same as money, in payment for any of the company's lands acquired as aforesaid in Texas, at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of \$100 or its multiple."

There seems to be nothing in the language of the mortgage to qualify the promise of the bond. It is quite immaterial whether the mortgage secures the interest of the bonds by a lien upon the lands of the company, or by a lien upon the earnings of the company, or by a lien upon both, or whether it is not secured at all by the mortgage. If there is an agreement to pay interest, and it is not paid, there is a breach of the bond for which the holder can maintain an action. Whether his interest can be collected through a foreclosure of the mortgage is a different inquiry, and not relevant now. It would have been simple enough to have made the interest payable only out of the net earnings of the company's railway by the terms of the bond, if that had been intended.

2. By the terms of the bond the defendant reserved the option, in case the net earnings of its railway were not sufficient in any year to enable it to pay the interest on its bonds, to issue scrip for the interest. The complainant avers that the defendant has neither paid the interest nor exercised the option. By its answer the de-

defendant denies that it has failed to exercise this option, and denies that the plaintiff has demanded payment of the interest. The fact, whether the net earnings of the defendant's railway are sufficient in any one year to pay the interest or not, is one peculiarly within its knowledge, and it is not incumbent upon a holder of the bond to assume the burden of proving the negative. He is not bound to accept the scrip unless the fact exists which authorizes the defendant to substitute scrip for money. His right of action is *prima facie* perfect upon proof of non-payment of the interest, on the presentment of his bond at the place where the interest is made payable. It then devolves upon the defendant to show the existence of the fact which authorizes it to tender scrip, and then the exercise of the option.

This general view of the questions at issue has been stated in order to indicate what issues are fairly presented by the pleadings, and what extraneous matter in the answer has no proper place there. The plaintiff's motion to strike out as irrelevant and redundant is granted, so far as it will eliminate from the answer any and all proceedings, resolutions, mortgages, constructions, understandings, and intentions of the defendant, which are not recited in the bonds in suit, or in the mortgage securing these bonds, because the plaintiff was not a party to them, and is not affected by them. This results in striking out nearly 40 folios of the answer,—a result which justifies this motion, although generally motions of this character are not to be encouraged. In view of the averments of the answer at folios 53 to 63, the plaintiff's motion to make another part of the answer more definite and certain is denied.

It is not intended by this decision to preclude the defendant from the benefit of anything contained in the mortgage which may be urged on the trial of the action as qualifying the promise set forth in the bonds. The bonds and mortgage are one obligation, and may be read and construed together. Neither is it intended to indicate what action on the part of the defendant is a due exercise of its option to pay interest in scrip.

HALL v. CITY OF NEW ORLEANS.<sup>1</sup>

(Circuit Court, E. D. Louisiana. February, 1884.)

## 1. ACT OF LOUISIANA, No. 73 OF 1872.

The act of the legislature of Louisiana, No. 73 of 1872, approved April 26, 1872, (Sess. Acts 1872, p. 124,) was in force until the passage of the premium bond act, March 6, 1876, (Sess. Acts 1876, p. 54.) By section 15 of the act of 1872 a sinking fund was created for certain bonds of the city of New Orleans, in which fund the bondholders interested were declared to have a vested interest. The taxes levied and collected under the act were insufficient to pay the coupons maturing while the law was in force. *Held*, that holders of coupons maturing after the repeal of the law acquired no right to the fund; holders of coupons maturing before the repeal of the law were entitled to the fund in the hands of the fiscal agent, and could have enforced collection as the taxes were collected and received by him.

## 2. PRESCRIPTION—PLEDGE.

As long as the debt secured remains unpaid and the pledge continues in existence, whatever be the time elapsed since maturity, the defense of prescription cannot be raised. *Forstall v. Consolidated Ass'n*, 34 La. Ann. 776. As to the coupons which fell due prior to the repeal of the act of 1872, prescription has been interrupted; those which fell due after the repeal, and more than five years prior to the institution of this suit, are prescribed.

At Law.

*E. H. Farrar*, for plaintiff.

*Henry C. Miller and Chas. F. Buck*, City Atty., for defendant.

PARDEE, J. Act No. 73, approved April 26, 1872, (Sess. Acts 1872, p. 124,) was in force until the passage of the premium bond act, March 6, 1876. Under the provisions of section 15 of the said act of 1872 a sinking fund was created for all city bonds for which no other retiring provision existed by law, in which fund the bondholders interested were declared to have a vested interest. In pursuance of this section taxes were levied in 1873 and 1874, which were collected from time to time to this day, whereby a trust fund has been in the hands of the fiscal agent of the city, particularly so, until it was distributed by order of this court in the case of *Lauer v. The City* (not reported) in the year 1883.

The taxes so levied and collected have been insufficient to pay the coupons maturing while the law was in force. As the fund was insufficient to pay coupons maturing while the law was in force, holders of the coupons maturing after the repeal of the law acquired no right to the fund, for in no sense could it be said to be a trust fund for their benefit. The case is different with regard to the holders of coupons maturing before the repeal of the law. They were entitled to the funds in the hands of the fiscal agent, and could have enforced collection as the taxes were collected and received by the agent.

In the case of *Forstall v. Consolidated Ass'n* the supreme court of Louisiana say:

"It is no objection that the object or thing pledged was not delivered to the creditor. Even in the absence of a *law contract*, it is lawful to stipulate that

<sup>1</sup> Reported by Joseph P. Hornor, Esq., of the New Orleans bar.