

its own benefit. The trustee was under no obligation to pay the taxes, nor even to see to it that the original mortgagors paid them. The trust agreement contemplated no such action on his part. It was for the defendant to see to it that each security pledged as collateral for debentures continued to be what the contract required it to be,—“a first charge upon real estate.” When unpaid taxes became a first charge upon the property, the trustee was entitled under the contract to return the degraded security, and require from defendant a “first-charge” security in its place, or to insist upon a deposit of further security as collateral. The various payments of taxes made by defendant, therefore, were payments in its own behalf, to relieve it from the obligation of replacing securities, and are not proper charges in its hands against the trustee.

The several trustees, moreover, ask for the delivery to them of the tax receipts, and upon this point receivers ask for instructions. This is practically already answered. They represent payments by defendant to protect its own interests, and should be retained by it. They constitute the evidence by which defendant may show, whenever challenged to do so, that the several securities to which they relate are still, so far as the lien of taxes is concerned, a first charge upon the property. They are not muniments of title. It is the original entry on the tax books, and not the duplicate thereof, issued to the taxpayer, that discharges the tax lien.

The trustees also ask for the delivery to them of the tax titles, and of the certificates of title, and upon this point receivers ask for instructions. That question will not now be decided, and, until it is presented more fully than it is on this application, receivers will retain such titles and certificates.

It is urged on behalf of the trustees that the pledgor of the mortgage should not be allowed to buy in a superior title, and thus destroy the value of the property he has pledged; and the clause in the trust agreement providing that, for the purpose of effectuating any sale or transfer of the pledged securities, in order to realize upon them in the event of default, the defendant company shall, on the requirement of the trustee, execute all proper and necessary deeds and other instruments, may be cited in support of the proposition that a tax title subsequently purchased should be assigned. But there may be some equitable consideration which would deprive the trustee of any right to insist upon compliance with this clause. For example, the trust agreement gives the trustee a most comprehensive power of sale, either “at public auction or by private treaty.” But if it should appear that a trustee had arbitrarily sold all the securities pledged for a series of debentures at private sale, at a sum far below what they could at the same time have been sold for in the open market, thereby increasing the general indebtedness of defendant, and thus reducing the dividend ultimately to be paid to the general creditors, it is questionable whether a court of equity will aid him in his effort to withdraw valuable assets from the general fund. It is manifest that this question can be answered only upon a full presentation of all the facts.

Upon payment of the sums collected as principal, the receivers will require delivery to them of any bonds and mortgages fully paid off, and will also see to it that all partial payments are indorsed on the respective bonds partially paid.

---

COE v. EAST & WEST R. CO. OF ALABAMA et al.

SMITH v. KELLY.

(Circuit Court, N. D. Alabama, S. D. December 10, 1894.)

ATTORNEY'S LIEN—TO WHAT ATTACHES.

One S., a lawyer, was retained by K. and B. to protect their interest in a large number of the bonds of an insolvent railway company. S. rendered important services, which were fully successful. The road was ordered to be sold under the decree in a foreclosure suit, and, before the sale, S. was discharged by K. and B., and the discharge recognized by the court, reserving S.'s right to have his compensation fixed and the extent of his lien declared. At the foreclosure sale, K. bought the road. S. afterwards applied to have his compensation fixed and lien declared. *Held*, that S. had a lien upon the bonds of his clients and upon any portion of the proceeds of the sale applicable to their payment, but that his lien did not extend to the property of the road in the hands of K. after his purchase thereof, even though the purchase price was insufficient, after paying costs and receiver's certificates issued by order of the court, to leave any balance applicable to the bonds.

This was a suit by George S. Coe, as substituted trustee, against the East & West Railroad Company of Alabama and others, for the foreclosure of a mortgage. Frank Sullivan Smith, formerly solicitor for the defendants Eugene Kelly and John Byrne, filed his intervening petition, asking to have his compensation fixed and the lien thereof declared. The petition was referred to F. S. Ferguson, as special master, who filed a report, to which exceptions were taken. The report is as follows:

To the Honorable, the Judges of said Court:

In obedience to the order of the court, dated May 19, 1893, I gave due notice to the parties to this intervention that I would take the testimony therein at No. 35 William street, New York, on the 19th day of June, 1893, which time and place was consented to by the intervener and respondent. Accordingly, I attended at said time and place, and the parties duly appeared before me in person and by their counsel. Mr. Denegre, in behalf of the respondent, objected to the taking of the testimony, or to any proceedings under the order of reference of May 19, 1893, because—First, the court had no jurisdiction to make such order; and, second, because of the want of proper parties defendant, Mr. Kelly being made the sole defendant, whereas John Byrne should have been joined with him. I stated to counsel then, and now report, that I had no authority to determine a plea to the jurisdiction of the court, or to pass upon the legal sufficiency of or to grant an amendment to any pleadings sent to me by the court. Doubtless, the objection was made by counsel in order that his client might not be held to have waived it by silence. For this purpose, and no other, I permitted the objection to be entered as a part of the proceedings before me, and now report that it was made before any of the testimony was taken. A careful study of the order of reference has convinced me that the court has already ascertained that the relation of solicitor and client did exist between the intervener, Frank Sullivan Smith, Esq., and the respondent, Mr. Eugene Kelly, in the cases of the foreclosure