

ANTELO v. FARMERS' LOAN & TRUST CO.

(Circuit Court, S. D. New York. June 22, 1899.)

RAILROAD MORTGAGE—DUTIES AND LIABILITIES OF TRUSTEE.

In a bill by railroad bondholders against the trustees in the mortgage to recover for negligent management of the trust, an allegation that defendant permitted to go undefended a suit brought against the mortgagor company to forfeit its right in a land grant to which it was entitled on the payment of \$600,000, and that the property was thus lost to the bondholders, does not state a cause of action where it is not alleged that defendant was a party to the suit, or that it had any funds with which to make the payment necessary to protect the grant.

On Demurrer to Bill.

Benj. F. Tracy and Wm. Pinkney Whyte, for complainant.
David McClure and John E. Parsons, for defendant.

WALLACE, Circuit Judge. The bill in this action is filed by the owner of mortgage bonds made by the Oregon Pacific Railroad Company against the trustee named in the mortgage, to recover the loss alleged to have been sustained by him because of the breaches of duty of the trustee. The complainant proceeds upon substantially the same averments as those alleged in the bill of complaint in *Frishmuth v. Same Defendant*, 95 Fed. 5. The defendant has interposed demurrers similar to those interposed in that case. Most of the questions presented by the demurrers have been considered in the *Frishmuth Case*, and do not require further discussion. In the present bill, however, the complainant, instead of alleging that when the trustee issued the bonds to the Oregon Company that company had lost the right to acquire the 850,000 acres of land originally granted to the Wagon-Road Company, avers, in substance, that the right existed until the fall of 1894, when a suit was instituted for the purpose of forfeiting the right, and was allowed to go undefended by the trustee, wherein a decree was entered "involving a loss to the bondholders aforesaid under the deed of trust of at least \$3,000,000." It may be assumed from the averments that the Willamette Company, through its contract with the Wagon-Road Company, and the Oregon Company, through its contract with the Willamette Company, might have successfully defended that suit, and compelled a conveyance of the land to one of these corporations, and thus the mortgage would have attached to the land. It does not appear, however, that the trustee was a party to that suit, or that it had any funds with which to make the payment to the Wagon-Road Company, which was a preliminary to compelling a conveyance of the land. A tender had been made by Mr. Turner, but it appears by the record evidence annexed to the bill that he was acting as attorney for the Willamette Company, and the tender was made for that company. What became of the money tendered does not appear. At the time the suit was brought, the trustee had commenced proceedings to foreclose the mortgage on account of the default of the Oregon Company in not paying the interest upon the bonds, and it appears that in December, 1894, all the mortgaged property was sold under the decree for \$100,000. The

bill does not disclose how the trustee, under the circumstances, by defending the action, could have realized anything for the bondholders. It is alleged also that the defendant mismanaged the foreclosure proceedings, but the facts are entirely insufficient to warrant the deduction. Not a single fact is alleged in reference to the conduct of the foreclosure suit which is not consistent with the hypothesis that the trustee did its whole duty, notwithstanding the small amount realized at the sale. The averments about the bid of Zephin Job do not show that he was responsible to the amount of the bid, or that it was not for the interests of the bondholders that the bid be set aside, as was done by the order of the court. The substantial cause of action upon the facts set forth is found in the breach of duty by the trustee in certifying and delivering the bonds to the Oregon Company without proper evidence of the purpose of that company to use the proceeds, as by its promises it was required to do.

The same disposition will be made of the several demurrers as was made in the Frishmuth Case, except as to the second, which alleges a defect of parties complainant. The present bill is brought in behalf of all bondholders who choose to join the complainant, and that demurrer is overruled.

Ordered accordingly.

MORRIS et al. v. EAST SIDE RY. CO. et al.

MAXWELL v. SAME.

(Circuit Court, D. Oregon. June 24, 1899.)

PLEDGES—COLLUSIVE SALE OF COLLATERAL—RIGHTS OF PURCHASER.

An issue of \$300,000 of bonds of a street-railway company were pledged to a bank to secure notes for \$163,000, the loan being, in effect, made to the company. After maturity, and pending the foreclosure of a second mortgage given by the company, the bank transferred the notes and collateral to a second party, who at once advertised and sold the bonds under the terms of the pledge. They were purchased for \$173,000, which was less than the amount of the debt, of which the purchaser paid down \$10,000, borrowing the amount necessary to complete the payment on the next day and a day or two later, in accordance with a prior arrangement, borrowing the money to repay such loan from the bank which was the original pledgee on a rehypothecation of the bonds. *Held*, that the circumstances of the entire transaction indicated that it was not the purpose of the bank, by the sale of the collateral, to realize its debt, but that such sale was contrived to obtain the title of the pledgor to the bonds at a sacrifice for the benefit of either the bank or the purchaser, and in either case the holder would be permitted to enforce them, as against the company or its creditors, only to the extent of the debt secured.

These are suits in equity to foreclose a mortgage on the property of the East Side Railway Company.

Ralph E. Moody, for Morris & Whitehead.

Wirt Minor, for A. L. Maxwell, trustee.

W. A. Cleland, for East Side Ry. Co.

Milton W. Smith and W. S. Goodfellow, for German Savings & Loan Soc.