

Case No. 5,133.

{5 N. B. R. 122.}¹

IN RE FRIZELLE.

District Court, E. D. Michigan.

1871.

BANKRUPTCY—APPLICATION BY CREDITOR FOR LEAVE TO FORECLOSE HIS MORTGAGE—NOTICE TO THE ASSIGNEE.

A petition by a secured creditor for leave to foreclose his mortgage, will be dismissed where no notice is shown to the court to have been given to the assignee of such application, and no proof made of the existence of the debt nor the amount.

{Cited in *Re Haskell*. Case No. 6,191; *Re Haake*, Id. 5,883; *Phelps v. Sellick*, Id. 11,079; *Re Hufnagel*, Id. 6,837.}

Application of Helen L. Derby, a secured creditor, for leave to foreclose her mortgage. The petition states that the petitioner holds a mortgage on certain real estate of the bankrupt [S. F. Frizelle], given by him before his bankruptcy, for eight hundred and forty-nine dollars, purchase money, in part of the mortgaged property, and that the property is worth not to exceed nine hundred dollars, and that the debt for which the mortgage is so held has not been proven in the bankruptcy proceedings. No notice of the application is shown to the court to have been given to the assignee, and no proof is made of the existence of the debt, or of its amount To grant permission for a sale without previous proof of the claim, would be to assume as proved the facts upon which the right to the order is dependent The court therefore, holds that the mortgage debt must be first proved in the usual manner before the register, in the bankruptcy proceedings. It must be so proved as a secured claim. No dividends of course can be made upon it until after the property mortgaged has been sold, and the proceeds deducted from the debt as proven, when dividends may be made upon the balance, if any. This is the true meaning of section 20 [Act 1867 (14 Stat 526)], deduced by construing the second paragraph and the last clause of the last paragraph, and section 22 together. After the claim has been thus duly proven in the bankruptcy proceedings, the creditor may, on due notice to the assignee, apply to the court to have the mortgaged property sold. See also, *In re Bigelow* [Case No. 1,396]; *In re Davis* [Id. 3,618]; *In re Ruehle* [Id. 12,113]; *In re Smith* [Id. 12,984]. For the reasons above set forth the petition is dismissed.

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