IN RE HUNT.

Case No. 6,884.

{17 N. B. R. 205;[1] 35 Leg. Int. 71.}

District Court, D. New Jersey. Feb. 5, 1878.

BANKRUPTCY—PROOF OF DEBT—ASCERTAINMENT OF VALUE OF MORTGAGE SECURITY.

After the adjudication, a creditor, who held a mortgage for fifteen thousand dollars on the bankrupt's real estate, had it sold at public auction and purchased it himself for one hundred and forty-two dollars and fifty cents. He then proved for the residue of the mortgage as an

unsecured claim at the first meeting of creditors. The register allowed the proof against objections and permitted him to vote for assignee, whereby a majority in value of the creditors was obtained: *Held,* that no such mode of ascertaining the value of mortgage security is recognized by the bankrupt act [of 1867 (14 Stat. 517)]; that the register had no authority to admit the proof and allow the vote against objection; and that the choice of the assignee under such circumstances was irregular.

[In bankruptcy. In the matter of William R. Hunt.]

NIXON, District Judge. At the first meeting of creditors, in the above case, held for the choice of an assignee, before Mr. Register Stratton, at his office, in the city of Camden, on the 28th and 29th days of January, 1878, twenty-nine creditors, proving debts to the amount of forty thousand three hundred and fifty-five dollars and eighty-nine cents, voted for Mr. Lincoln D. Farr, and forty-three, proving debts to the amount of forty-six thousand six hundred and ninety-nine dollars and fifty-five cents, cast their votes for Mr. James Flynn, a majority in number and value being in favor of Mr. Flynn, I am asked to prove and confirm his election. It appears, however, that amongst the proofs of claim offered was one by Andrew M. Moore, for twenty-one thousand eight hundred and fifty-seven dollars and fifty cents, and that objections were duly made by other creditors to his proving or voting, upon the ground that a large portion of his debt was secured, and that he had not surrendered his security before making proof, as required by section 5075 of the act. The register overruled the objections, and allowed the creditor to vote for Mr. Flynn, whereby the requisite majority in value was obtained for him. If his vote was improper, or, under the circumstances, unlawful, then an election by the creditors fails, as the greatest part of the creditors in number is for one candidate, and the greatest part in value for the other. The objection to the proof of claim was this: The creditor held a fourth mortgage upon the real estate of the bankrupt for fifteen thousand dollars. Instead of surrendering it before proof of his debt, he attempted to determine its value by a public sale of the mortgage. He sent it, without the accompanying bond, to M. Thomas & Sons, auctioneers, and caused it to be advertised for sale, at their auction store in the city of Philadelphia, on the 26th of January, 1878. He, of course, became the purchaser, for the net sum of one hundred and forty-two dollars and fifty cents, and reckoning that to be the value of his security, he made a proof of claim for the residue of his mortgage debt, to wit, fourteen thousand eight hundred and fifty-seven dollars and fifty cents, which amount went to make up his whole claim against the bankrupt estate of twenty-one thousand eight hundred and fifty-seven dollars and fifty cents.

These facts appear by the affidavit of the attorney for the excepting creditors sent up by the register with the other papers in the case. It is objected that no such mode of ascertaining the value of a mortgage security is recognized by the bankrupt act, and that the register exceeded his authority when he decided in favor of the validity of the proof of claim and allowed the creditor to vote. Both objections are well taken. The register ought

to have said to the proving creditor: "The bankrupt act has provided no machinery for determining the value of your mortgage security, before an election is had of an assignee. If you wish to vote upon the debt, which the mortgage was given to secure, you must here and now surrender the mortgage, and give your lien and stand as an unsecured creditor. If you do not consent to this, I must postpone the proof of your claim until after the election, and allow you to prove and vote only upon that portion for which you hold no security. Your method of determining the value of your mortgage was essentially ex parte, peculiar, and unauthorized by the law at this stage of the proceedings. The forms of sale that you invoked do not change your relations to the bankrupt's estate. You were the purchaser, and you still hold the security, as perfect a lien as it was before the sale took place." Or, if he had taken a different view of the objections raised by the excepting creditors, and had deemed them too trivial to authorize him to postpone the proof of claim, he should have said to the exceptants: "I cannot postpone this proof, because, in my judgment, it is admissible, notwithstanding your objections. But, unless your objections are withdrawn, I shall adjourn the election to a future day, and send the question to the court for decision. I have no power under the law to admit the proof. My power ends with the postponement. All unsecured creditors have the right to vote for an assignee, and believing that this creditor ought to be permitted to cast his vote for the whole amount of his claim—less the sum that the mortgage brought at the sale—I must await the action of the court upon the matters raised by the exception."

I did not suppose it was an open question, that a secured creditor cannot vote for an assignee without first surrendering his security. If authority is needed for such a proposition, see Blum. Bankr. 169; Bump, Bankr. (8th Ed.) 117; In re Davis [Case No. 3,614]; In re Hanna [Id. 6,027]; In re Parkes [Id. 10,754]. And that the power of the register is exhausted when he postpones the proof of claim, and that he cannot admit the claim and allow the vote against objection, see In re Noble [Id. 10,282], and In re Bartusch [Id. 1,086]. In the last case, Judge Lowell, in discussing the power of registers, says: "If debts are objected to, and the register considers them not doubtful, but

clearly valid and admissible, be yet cannot admit them to proof against objection, because that would be the decision of a question which the statute gives him no power to decide." The admission of the proof complained of determined the choice of the assignee. If the creditor had proved for his unsecured debt of seven {thousand}[2] dollars he would have been entitled to vote, but such a reduction of his claim would have given to the opposing candidate the greater part of the creditors in value, and hence defeated the election. For these reasons I cannot approve the choice of Mr. Flynn, but will hear the counsel representing the opposing interests on the question whether a new election should be ordered, or an assignee be appointed by the court.

[1] {Reprinted from 17 N. B. R. 205, by permission.}

[2] {35 Leg. Int. 71, gives "hundred."}